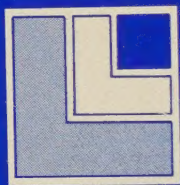


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ARCHBOLD'S
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The Seventh Edition,

By THOMAS CHITTY, Esq.,

OF THE INNER TEMPLE,

INCLUDING

THE PRACTICE

OF

The Courts of Common Pleas and Exchequer.

—◆—
VOL. II.

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PART I.

PROCEEDINGS UPON PLEAS IN ABATEMENT, &c.

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PART I.

WHEN the plaintiff has delivered or filed his declaration, the defendant, having appeared, may plead either to the *jurisdiction*, or in *abatement*, or in *bar*. The proceedings upon pleas in bar have already been fully considered in the last Book; we shall now treat of those upon pleas to the jurisdiction and pleas in abatement, under the following heads: *viz.*—

Nonjoinder, 651.*Misnomer*, 652.*Privilege*, 653.*Parol Demurrer*, *id.**In Ejectment*, *id.**The Plea, when and how pleaded,*
*and Affidavit of Truth, &c., id.**Amendment of*, 655.*Replication, &c., id.**Issue, &c., 656.**Judgment, id.**Costs, id.**Subsequent Proceedings*, 657.

Nonjoinder.] By stat. 3 & 4 W. 4, c. 42, s. 8, “no plea in *Nonjoinder*. abatement for the *nonjoinder* of any person as a *co-defendant*, shall be allowed in any court of common law, unless it shall be stated in such plea that such person is *resident within the jurisdiction of the court*, and unless the *place of residence* of such person shall be stated with convenient certainty in an *affidavit* verifying such plea” (*a*). And, by s. 9, “to any plea in abatement in any court of law of the *nonjoinder* of another person, the plaintiff may reply, that such person has been discharged *by bankruptcy and certificate*, or *under an act for the relief of insolvent debtors*.” And sect. 10 enacts, “that in all cases in which, *after such plea* in abatement, the plaintiff shall, *without having proceeded to trial upon an issue thereon*, commence *another action* against the defendant or defendants

(*a*) This section does not apply to any case of *nonjoinder*, except where the plaintiff can go on against the party pleading in abatement, (*per Parke, B., Jones v. Smith*, 6 Dowl. 557,) where a plea of coverture of the defendant was held not to be within its provisions. See forms of plea, replication, and affidavit, Chit. Forms, 298, 299.

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in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea of abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or in the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall, nevertheless, be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants, who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person; provided, that any such defendant who shall have so pleaded in abatement shall be at liberty, on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement." These sections do not apply to a plea of coverture (*b*).

Where the Statute of Limitations has run as against one.

By Lord Tenterden's act, (9 *G.* 4, *c.* 14, *s.* 2), "if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, [the Statutes of Limitations], or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

In Actions against Carriers.

By the Common Carriers' Act, (11 *G.* 4 & 1 *W.* 4, *c.* 68, *s.* 5), "any one or more of such mail contractors, stage coach proprietors, or common carriers, shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid."

Misnomer.

Misnomer.] As regards pleas in abatement for a *misnomer*, the 3 & 4 *W.* 4, *c.* 42, *s.* 11, enacts, "that no such plea shall be allowed in any *personal* action, but that, in all cases in which a *misnomer* would, but for this act, have been by law *pleadable in abatement* in such actions, the defendant shall be at liberty to cause the declaration to be *amended*, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an affidavit of the right name (*c*); and, in case such summons should be *discharged*, the costs of such application shall be paid by the party applying, if the judge shall think fit" (*d*). It is questionable whether the words of this enactment are *peremptory*; and where a judge had made an order for amending a *misnomer* in a declaration on payment of costs, the court granted a rule to shew cause

(*b*) *Jones v. Smith*, 6 Dowl. 557.

(*c*) See forms, Chit. Forms, 298.

(*d*) See the cases on this statute, *ante*, Vol. I. 511, &c.

why the judge's order should not be amended, and for a stay of proceedings in the meantime (*e*). Sect. 12 allows the plaintiff to use the initials of the defendant's name, in actions upon written instruments wherein the defendant has used those initials (*f*).

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Privilege of Attornies.] An attorney, provided he be not sued in a representative character, or jointly with unprivileged (*g*) persons, and that the plaintiff have not privilege in the court in which the action is brought, is still entitled, notwithstanding the Uniformity of Process Act (*h*), or the 1 V. c. 56 (*i*), to be sued in the court of which he is an attorney, and if sued in any other court, he may plead his privilege to the jurisdiction of the court, provided he pleads in person and not by attorney. This plea must be verified by affidavit (*k*).

Privilege of Attornies.

Parol Demurrer.] Before the 11 G. 4 & 1 W. 4, c. 47, s. 10, when an infant was sued as heir on the obligation of his ancestor, though he could not have pleaded in abatement of the suit, the *parol* might have demurred, or proceedings thereon have been stayed till he came of age; but this course is now abolished by that act. (*See post*, Book III. Part II. Ch. 6, Sect. 1).

Parol Demurrer

In Ejectment.] In ejectment the defendant, according to the terms of the consent rule, can plead the general issue only; he cannot, under any circumstances, plead in abatement; and if he wish to plead to the jurisdiction, it is necessary that he should previously obtain the leave of the court to do so (*l*).

In Ejectment.

The Plea, when and how Plead, and Affidavit of Truth, &c.] The defendant, if he intend to plead in abatement or to the jurisdiction, must deliver his plea to the plaintiff's attorney, or, in country causes, to the agent in town, on or before the fourth day exclusive (*m*) after the delivery or filing and notice of the declaration. And this, it seems, though no rule to plead be given. If Sunday happen to be the last of the four days, the defendant is at liberty to plead upon the Monday (*n*). The defendant is not bound, unless otherwise ordered, to plead on any day between the 10th August and 24th October (*o*). And in case the time for pleading has not expired before the 10th August, the defendant has the same number of days for pleading after the 24th October as if the declaration had been delivered or filed on the 24th October (*p*). Where two

The Plea, when and how Plead, &c.

(*e*) *Henekey v. Earl Strathmore*, 13 Leg. Obs. 45.

(*f*) See the enactment, *ante*, Vol. I. 485.

(*g*) See *Ramsbottom v. Harcourt*, 4 M. & Sel. 485. *Quære*, whether he would lose his privilege, even if sued jointly with unprivileged persons. (*Keep v. Biggs*, 2 Dowl. 278).

(*h*) *Lewis v. Ker*, 5 Dowl. 447: *ante*, Vol. I. 47.

(*i*) *Pryer v. Smith*, 6 Dowl. 299: *Percival v. Cook*, 7 Dowl. 500; 5 M. & W. 53, S.C.

(*k*) *Davidson v. Watkins*, 3 Dowl. 129.

(*l*) *Deighton v. Foster*, Barnes, 187; *Roman v. Norright*, Id. 194: *Williams v. Keen*, 1 W. Bl. 197; and see *Doe Rust v. Roe*, 2 Burr. 1046: *Hatch v. Cannon*, 3

Wils. 51: *Doe Duchess of Hamilton v. Robinson*, 2 Str. 1120.

(*m*) *Ryland v. Worsland*, 5 Dowl. 581; 6 Law, J., N. S. 119; 2 M. & W. 393, S. C. Before the rule of H. T., 2 W. 4, r. 8, *ante*, Vol. I. 93, the four days were reckoned inclusive. (*See Jennings v. Webb*, 1 T. R. 277; *Harbord v. Perigal*, 5 T. R. 210; *Hutchinson v. Brown*, 7 Id. 298; *Brandon v. Webb*, 1 Id. 689; *Long v. Müller*, 1 Wils. 23; 2 Stra. 1191, S. C.)

(*n*) See *Lee v. Carlton*, 3 T. R. 642: R. E., 5 A. a.

(*o*) See 2 W. 4, c. 39, s. 11.

(*p*) R. M., 3 W. 4, r. 12, *ante*, Vol. I., 94, 153.

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actions had been vexatiously brought for the same cause, the court allowed the defendant to plead in abatement, even after the four days had elapsed (*q*); and leave has been given to plead the nonjoinder of a co-contractor after the four days, that being considered a plea in abatement more to be favoured than those which constitute a mere formal objection (*r*). If the defendant plead in abatement or to the jurisdiction, either wholly or in part, after the time here mentioned, without leave of the court or a judge, the plaintiff may treat the plea as a *nullity*, and sign judgment at the expiration of the time allowed for pleading (*s*).

Must be after
Appearance.

The defendant must, of course, enter a common appearance before he can be allowed to plead in abatement or to the jurisdiction (*t*). In bailable cases, before 1 & 2 V. c. 110, he must have put in bail: but it was not necessary that he should *justify* his bail before he pleaded (*u*). Since that act he may plead in abatement without reference to the state of the bailable proceedings.

And after
Declaration.

The plea cannot be delivered before the plaintiff has declared (*x*); and where the declaration has been filed, the plea cannot be delivered before the defendant has taken the declaration out of the office (*y*).

Where to be
pleaded in
person.

A plea to the jurisdiction must be pleaded in person, and not by attorney (*z*). If a *feme covert* plead her coverture in abatement, she must plead it in person (*a*). But, in all other cases, pleas in abatement may be pleaded either by attorney or in person, or by guardian, if the defendant be an infant, in the same manner as pleas in bar (*b*).

Must be veri-
fied by Affi-
davit.

The plea must be *verified by affidavit* (*c*); and this, whether it be a plea of privilege (*d*), of infancy (*e*), nonjoinder (*f*), or the like. But there is no occasion for such affidavit, if the matter of the plea appear upon the face of the record (*g*). The affidavit may be made either by the defendant or a third person (*h*). If it be annexed to a plea, it may be in a general form verifying the plea, and it would seem, that it need not, in such case, be entitled in the cause (*i*), though it is usual to do so. But if it be not annexed to the plea, it must be entitled in the cause, and must contain a special statement of the facts contained in the plea (*k*). The affidavit verifying a plea of

(*q*) *Soutter v. Dunston*, 1 M. & R. 508, 510: see *Milner v. Milnes*, 3 T. R. 632.

(*r*) See Chit. Sum. Pract. 130: *Soutter v. Dunston*, 1 M. & R. 508.

(*s*) *Brandon v. Payne*, 1 T. R. 689; R. E., 5 A.; *Martindale v. Harding*, 1 Chit. Rep. 716: *Nolleken v. Severn*, 1 Dowl. 320; 2 C. & J. 333, S. C.; 4 Dowl. 631.

(*t*) *Saunders v. Owen*, 2 D. & R. 252; *Wakefield v. Marden*, 2 Chit. Rep. 8.

(*u*) *Dymdale v. Nielson*, 2 East, 406; *Cassen v. Bond*, 2 Y. & J. 531; *Hopkinson v. Henry*, 13 East, 170.

(*x*) *Douglas v. Green*, 2 Chit. Rep. 7; and see *Bowyer v. Kemp*, 1 Dowl. 281; 1 C. & J. 287, S. C.

(*y*) *Bond v. Smart*, 1 Chit. Rep. 735; *Douglas v. Green*, 2 Id. 7: but see *White v. Dent*, 1 B. & P. 341; *ante*, Vol. I. 168.

(*z*) *Gilb. C. B.* 187; 1 Bac. Abr. 2; *Grant v. Sondes*, 2 W. Bl. 1094.

(*a*) 2 Saund. 209 a.

(*b*) *Id.*; and see further, 1 Chit. Pl. 6th ed. 456.

(*c*) 4 A. c. 16, s. 11. As to the certainty required in the affidavit, see *Dobbin v. Wilson*, 3 Nev. & M. 260; *Pearce v. Davy*, 1 Ld. Ken. 304; *Say*, 293, S. C. An affidavit that the plea "is a true plea" will not suffice. (*Onslow v. Booth*, 2 Str. 705).

(*d*) *Davidson v. Chilman*, 1 Scott, 117; 3 Dowl. 129; 1 Bing. N. C. 297, S. C.; *Stiles v. Mead*, 2 Str. 738; *Cunningham v. Johnson*, Say, 19.

(*e*) Pr. Reg. 5.

(*f*) *Id.* 4. See form, Chit. Forms, 298.

(*g*) *Hughes v. Alvarez*, 2 L. Raym. 1409; Pr. Reg. 5; *Gray v. Sidneff*, 3 B. & P. 397; see *Dobbin v. Wilson*, 3 Nev. & M. 260.

(*h*) Pr. Reg. 5, 6; *Lumley v. Foster*, Barnes, 344; 2 Saund. 211 f. See the form, Chit. Forms, 298.

(*i*) See *Prince v. Nicholson*, 5 Taunt. 333. And a mistake is fatal. (*Richards v. Setree*, 3 Price. 197.)

(*k*) See *Dobbin v. Wilson*, 3 Nev. & M. 260, where the affidavit was special.

nonjoinder of a co-defendant must state the place of residence of such party with convenient certainty (*l*). When ancient *demesne* is pleaded, the affidavit must state that the lands in question are holden of a manor which is ancient *demesne*, that the party has a freehold interest in it, and there is a court of ancient *demesne*, regularly holden (*m*). The affidavit must not be sworn before the declaration is filed or delivered (*n*). But where the affidavit was sworn in Liverpool the very day the declaration was filed in London, the court held it sufficient (*o*). And the same where it was sworn two days before the date of the plea (*p*).

If the plea be filed without an affidavit, or with an insufficient affidavit to verify it, the plaintiff may treat it as a nullity and sign judgment (*q*). But he cannot, it seems, get it set aside (*r*). No judgment of *nonpros* could be regularly signed for not replying to it (*s*), and the plea is such an absolute nullity that the defect cannot be waived (*t*). Where the affidavit was sworn before the defendant's attorney, the court held that the plaintiff could not treat the plea as a nullity on that account and sign judgment, although, probably, it might be a sufficient ground for setting it aside (*t*).

Consequences if not.

Engross the plea on plain paper, and get it signed by counsel (*u*); *write your affidavit on plain paper* (*v*), *annex it to the plea, and deliver them to the plaintiff's attorney or agent* (*y*). If not delivered within the time above mentioned, the plaintiff's attorney or agent should not receive it, though, indeed, it may be questionable whether the receipt of it would be deemed a waiver of his right to sign judgment after the time for pleading has expired, the plea being perhaps a nullity. We have seen (*ante*, 654) that if the declaration has been filed, the defendant must take it out of the office before he pleads, otherwise the plaintiff may sign judgment.

The Plea, &c. How prepared and delivered, &c.

Amendment of.] Pleas in abatement are not, in general, amendable because they are dilatory, and do not go to the merits of the action (*z*).

Amendment of.

Replication, Demurrer, &c.] The plaintiff replies or demurs to the plea in the same manner as to a plea in bar, except that the demurrer need not specially shew the causes of it in the body thereof (*a*). The court will not, in general, as we have just seen, quash the plea upon motion, however defective (*b*).

Replication, Demurrer, &c.

(*l*) 3 & 4 W. 4, c. 42, s. 8, *ante*, 651.
(*m*) *Doe Rust v. Roe*, 2 Burr. 1048.
(*n*) *Bower v. Kemp*, 1 Dowl. 281; 1 C. & J. 287; 1 Tyr. 260, S. C.; *Johnson v. Popplewell*, 2 C. & J. 545; 2 Tyr. 715, S. C.
(*o*) *Lang v. Comber*, 4 East, 348; and see *Baskett v. Barnard*, 4 M. & Sel. 332.
(*p*) *Poole v. Pembrey*, 1 Dowl. 693.
(*q*) *Chumley v. Broom*, Carth. 402; *Sherman v. Alvarez*, 1 Str. 639; *Hughes v. Alvarez*, 2 L. Raym. 1409; *Davidson v. Chitman*, 1 Bing. N. C. 297; *Richards v. Stree*, 3 Price, 197; in which case it was wrongly intitled; and see *Lang v. Comber*, 4 East, 348; *Poole v. Pembrey*, 1 Dowl. 693.
(*r*) *Bray v. Haller*, 2 Moore, 213; R. v.

Cooke, 2 B. & C. 618; *sed vide Pether v. Shelton*, 1 Str. 638; *Cunningham v. Johnson*, Say. 19, 293; R. v. *Grainger*, 3 Burr. 1617; *Poole v. Pembrey*, 1 Dowl. 693.
(*s*) *Garratt v. Hooper*, 1 Dowl. 28. The judgment was set aside without costs.
(*t*) *Horsefall v. Matthewman*, 3 M. & Sel. 154.
(*u*) See the form of a plea of nonjoinder, Chit. Forms, 290.
(*x*) See the form, Chit. Forms, 291.
(*y*) See *Jennings v. Webb*, 1 T. R. 278.
(*z*) Cas. Prac. C. P. 29; *Tidd*, 9th ed. 298.
(*a*) *Lloyd v. Williams*, 2 M. & Sel. 484.
(*b*) See, as to the replication, &c., *ante*, Vol. 1. 195, &c. See form of a

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Cassetur
breve.

If you cannot confess and avoid the plea, or deny it, or cannot safely demur to it, you should then enter on the roll a *cassetur breve*, as directed *post*, Book IV. Part I. Ch. 20; and upon which neither party will be entitled to costs.

Issue, &c.

Issue, &c.] If issue in fact be joined between the parties, the issue is made up, and they proceed to trial, as in ordinary cases (*c*). So, if there be a demurrer and joinder, the subsequent proceedings to judgment exclusive are the same as in ordinary cases, and as mentioned *post*, 658 to 655 (*d*).

As to which party is to begin on the trial, see *ante*, 268.

Judgment.

For Plaintiff.

Judgment.] Judgment for the *plaintiff* upon verdict is peremptory, *quod recuperet* (*e*); and therefore, care must be taken at the trial, in cases where damages are the principal object of the action, that the jury (if they find for the plaintiff) assess the damages; otherwise, as an omission in this respect cannot be supplied by a writ of inquiry, a *venire de novo* must be awarded (*f*). Judgment for the plaintiff upon demurrer, or on replication of *nul tiel* record, is not final, but merely a *respondeas ouster* (*g*).

For Defendant.

Judgment for the *defendant*, in all cases, whether upon verdict, demurrer, or *nul tiel* record, is that the writ be quashed (*h*); unless, where the matter pleaded in abatement is some temporary disability, such as infancy, &c., in which case the judgment is, that the plaintiff remain without day until &c. (*i*).

A plea in abatement, with judgment of *respondeas ouster*, need not now be entered on the issue, or in the *Nisi Prius* record (*k*).

Costs.

Costs.] Upon a *cassetur breve* entered by plaintiff, neither party is entitled to costs (*l*). If there be a verdict for the plaintiff upon a plea in abatement, as the judgment in that case is peremptory, *quod recuperet*, he is, of course, entitled to costs as in other cases; and if the plaintiff have a verdict against him, or be non-suited, the defendant shall have costs for the same reason (*m*). Formerly, neither the plaintiff nor defendant was entitled to costs on a judgment on demurrer to a plea, &c., in abatement (*n*); but now, by the 3 & 4 W. 4, c. 42, s. 34, either party succeeding on such a demurrer shall be entitled to his costs, as in other cases.

replication to a plea of nonjoinder, Chit. Forms, 299; as to the demurrer, and proceedings thereon, see *post*, 658; and as to the issue, &c., see Chit. Forms, 299.

(*c*) See the form of the issue, notice of trial; *Nisi Prius* record, jury process, *ostea*, judgment, and execution, Chit. Forms, 299, 66.

(*d*) See Chit. Forms, 301, &c.

(*e*) *Eichorn v. Lemaitre*, 2 Wils. 367; Gilb. C. B. 53; *Bowen v. Shapcott*, 1 East, 542.

(*f*) *Eichorn v. Lemaitre*, 2 Wils. 367; *Forwist v. Tremaine*, 2 Saund. 211, (n. 3); *post*, 710.

(*g*) *Thompson v. Colier*, Yelv. 112; *Barcker v. Forrest*, 1 Str. 532; *Bowen v. Shapcott*, 1 East, 542; and see *Anon.*, 1 Wils.

302. See the forms, Chit. Forms, 299.

(*h*) Gilb. C. B. 52. See the forms, Chit. Forms, 300.

(*i*) Tidd, 642. See, upon this subject, Com. Dig., Abatement, 1, 14, 15.

(*k*) *Pepper v. Whalley*, 5 Nev. & M. 437; 1 H. & W. 480, S. C.

(*l*) *Allen v. Morey*, M., 8 G. 2; Pr. Reg. 6; *Greenhill v. Shepherd*, 12 Mod. 145; *Hullock*, 126.

(*m*) *Affir v. Constable*, T., 13 G. 1; *Hullock*, 126; Ca. Pr. C. B. 35.

(*n*) *Gariand v. Erton*, 2 L. Raym. 992; 1 Salk. 194, S. C.; *Thomas v. Lloyd*, 1 L. Raym. 336; 1 Salk, 194, S. C.; and see *Michlam v. Bate*, 8 B. & C. 642; 3 M. & Ry. 91, S. C.

Subsequent Proceedings.] After judgment of *respondeas ouster*, the defendant has four days to plead (*o*). This, however, it seems, is in the discretion of the court (*p*); and it is said, that they will sometimes order the defendant to plead *instante*, or on the morrow (*q*).

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PART I.
Subsequent Proceedings.
Time for Pleading.
Order of Pleading.

The order invariable to be observed in pleading is thus:—

I. To the jurisdiction.

II. In abatement.

I. To the person.

1st. Of the plaintiff.

2nd. Of the defendant.

II. To the count.

III. To the writ.

1st. To the form of the writ.

2nd. To the action of the writ.

III. In bar of the action (*r*).

Pleading a plea in any one of these classes is deemed an acknowledgment that you have no ground for pleading a plea in any of the preceding classes, and a waiver of your right to do so. Therefore, after a judgment of *respondeas ouster*, you cannot plead a plea in the same or in any preceding degree or class with that which you have already pleaded; but you may plead one in any of the subsequent classes you please (*s*).

In making up the second issue, you must formerly have entered the plea in abatement and the proceedings on it to the judgment of *respondeas ouster* (*t*). But the omission of them was no ground for arresting the judgment, or for a new trial. And since *R. II.*, 4 *W.* 4, s. 15, it has been decided, that a plea in abatement, with judgment of *respondeas ouster*, need not now be entered on the issue or in the *Nisi Prius* record (*u*).

Entry of Proceedings in Second Issue.

We have seen *ante*, 651, that by the 3 & 4 *W.* 4, c. 42, s. 10, after a plea in abatement of the nonjoinder of another person, if the plaintiff commence another action against the original defendant and the party not joined, he has some rights given him which did not exist before that act. And in pursuance of that act, one of the recent rules of pleading of *H. T.*, 4 *W.* 4, r. 20, has prescribed a form for the commencement of a declaration in such case (*x*).

Declaration in Second Action.

(*o*) 1 Sellow, 275; *Cantwell v. Earl of Stirling*, 8 Bing. 177; 1 Moo. & Sc. 365; 1 Dowl. 265, S. C.

(*p*) *Rex v. Williams*, Comb. 19.

(*q*) Tidd, 641.

(*r*) Co. Lit. 303.

(*s*) See Com. Dig., Abatement; 2 Saund.

Rep. 5th ed. 40, 41.

(*t*) *Dobertein v. Chancellor*, 1 L. Raym. 329; Carth. 447, S. C.: *Addingson v. Oakley*, 5 Mod. 399; *Anon.*, 7 Mod. 51.

(*u*) *Pepper v. Whalley*, 5 Nev. & M. 437.

(*x*) See the form, Chit. Forms, 300.

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PROCEEDINGS UPON DEMURRER.

Demurrer, what, and how framed,
 &c., 658.
Setting it aside, 659.
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Demurrer,
 what, and how
 framed, &c.

Demurrer, what, and how framed, &c.] A DEMURRER is a pleading, which admits the facts as stated in the pleading of the opponent, and refers the law arising thereon to the judgment of the court (a). It is either to the whole, or a part of the declaration, or to the whole of the plea, replication, &c., or to the whole or part of a divisible plea or replication, &c.

When general
 and when
 special.

A demurrer is either *general* or *special*; the former being for some defect in substance, the latter for some defect in form (b). If the defendant is under terms of pleading *issuably*, he cannot demur *specially* to the declaration, but he may, notwithstanding, demur *specially* to the replication (*ante*, Vol. I. p. 163).

Form of.

Get the demurrer prepared by counsel or special pleader. The form of it is directed by the rule of H., 4 W. 4, r. 14, to be thus:—"The said defendant by —, his attorney, [or in person, &c., or the said plaintiff], says that the declaration [or plea, &c.] is not sufficient in law," *showing the special cause of demurrer, if any.* *Get the draft of the demurrer signed by counsel (c).* *Engross it and the marginal note on plain paper; and deliver the engrossment to the attorney or agent of the opposite party (d).* By the recent rule of H. T., 4 W. 4, r. 2, "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated: and if any

The marginal
 Note, stating
 Ground of
 Demurrer.

- (a) Co. Lit. 71. b.
 (b) Id. 72. a.
 (c) R. E., 18 C. 2, Q. B.: R. E., 33 Geo.
 3, C. P.: *Neal v. Richardson*, 2 Dowl. 89:
 Tidd, New Pract. 439.
 (d) By R. H., 4 W. 4, r. 1, "no de-

murrer shall in any case be *filed* with any officer of the court, but the same shall always be *delivered* between the parties." See the forms of demurrers and joinders thereto, Chit. Forms, 301.

demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea. Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way." This rule must be substantially complied with; therefore, where the marginal note of a demurrer to a plea of justification of a libel merely stated as cause, "that it is no justification of the libel," it was holden to be insufficient (*e*). But if the demurrer be *special*, the rule is satisfied by a reference in the margin to the causes stated in the body of the demurrer, without otherwise expressly stating those causes (*f*). Only one ground of demurrer need be specified (*e*), and, if several grounds be stated, it need not also be stated on which of them the party intends to rely (*h*). The want of a marginal note is no ground for objecting to the argument of the demurrer when called on; the only effect of the rule is, that a demurrer without such a note may be set aside as irregular (*i*).

[*Setting it aside as frivolous, &c.*] The court or a judge will not entertain an application to set aside the demurrer, unless it omit the marginal note, or unless it be palpably frivolous: if it raise a reasonable doubt, the matter will be referred to the regular judgment of the court on argument. In support of an application to the court, there must be an affidavit, stating the substance of the pleadings, or annexing a copy of them to it; or the rule must be drawn up on reading the pleadings, &c. (*k*). Where a rule for setting aside a demurrer as frivolous was drawn up on reading the affidavit only, which affidavit was insufficient, the court discharged the rule (*l*). The rule is a rule *nisi* only in the first instance (*m*). As the above rule of *H. T.*, 4 *W.* 4, says, that the demurrer may be set aside as *irregular*, the application to set it aside should be made within the time limited by the rule of *H. T.*, 2 *W.* 4, *r.* 33, noticed *Book IV. Part I. Chap. 17*; and it is too late to apply after joining in demurrer (*n*).

Setting it
aside as frivolous, &c.

The following demurrers have been held not to be frivolous: *viz.*—That it was alleged in declaration that defendant was indebted to plaintiff instead of plaintiffs (*o*). To debt on promissory note, that it did not appear that the words "value received" were in the note (*p*). To a count on a bill, because it alleged that the period of payment "is now elapsed," instead of "had elapsed before the commencement of this suit" (*q*); but this last ground of demurrer would probably now be considered frivolous (*r*). So, where to an action on a note the

What Demurrers have been held frivolous or not.

(*e*) *Ross v. Robeson*, 1 Gale, 102; 3 Dowl. 779, S. C.

(*f*) *Lindus v. Pound*, 2 M. & W. 240; 5 Dowl. 459, S. C.: *Berridge v. Priestley*, 5 Dowl. 306.

(*h*) *Whitmore v. Nicholls*, 5 Dowl. 521.

(*i*) *Lacy v. Umbers*, 3 Dowl. 732.

(*k*) 1 C., M. & R. 900 a.

(*l*) *Howorth v. Hubbersty*, 3 Dowl. 455; 1 C., M. & R. 900 a, S. C.

(*m*) *Spencer v. Newton*, 14 Leg. Obs. 82: *Kinnear v. Keane*, 3 Dowl. 154.

(*n*) *Norton v. Mackintosh*, 7 Dowl. 529.

(*o*) *Tyndall v. Ulithorne*, 3 Dowl. 2; but see *Lyng v. Sutton*, 4 Moo. & Sc. 417.

(*p*) *Cresswell v. Crisp*, 2 Dowl. 635: see *Lyons v. Cohen*, 3 Dowl. 243; but this demurrer seems not sustainable: *Kinahan v. Palmer*, 2 Jones Rep. Exch. Ir. 131; and the MS note of *Crisp v. Griffiths*, there cited by Joy, C. B.

(*q*) *Aslett v. Abbott*, 1 T. & G. 448; 1 M. & W. 209; 4 Dowl. 759, S. C.

(*r*) *Owen v. Water*, 2 M. & W. 91; 5

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defendant pleaded, that he accepted a bill drawn by plaintiff, and that plaintiff received that bill as satisfaction of the note; and plaintiff replied, denying the drawing, acceptance, and receipt in satisfaction, and defendant demurred on the ground of multifariousness, the court refused to treat the demurrer as frivolous, though the affidavit also stated that the plea was false(s). The following demurrers, on the other hand, have been holden to be frivolous: *viz.* That plea was dated 1832 instead of 1833(t):—a *general* demurrer to replication *de injuriâ* (to a plea of gaming in an action on bill)(u):—to *second* count of declaration by surviving partner, because it did not state the decease of the other partner, which had been already averred in the first count(v):—to a declaration on bill of exchange and account stated, with one promise “to pay the last-mentioned several monies on request,” on the ground that there was no promise to the count on the bill(x):—a single demurrer to counts for money lent, money had and received, and money due on an account stated, on the ground that they did not specify any time(y).

Joinder in
Demurrer.Where Plain-
tiff Demurs.

Joinder in Demurrer.] By the rule of all the courts of *H. T.*, 4 *W.* 4, r. 3, “no rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment”(z). Previously to this rule, by rule of *H. T.*, 2 *W.* 4, r. 108, if the plaintiff demurred, he might at once have added the joinder in demurrer; but since the rule of *H. T.*, 4 *W.* 4, this can no longer be done(a). The defendant being under terms to “rejoin gratis,” is not thereby bound to join in demurrer gratis(b). Where a defendant, after the time for joining in demurrer had expired, but before judgment signed, obtained a rule *nisi* to set aside the proceedings, with a stay of proceedings in the meantime; upon the rule being afterwards discharged, it was holden that the defendant had the whole of the day on which the rule was disposed of to join in demurrer(c).

Where De-
fendant de-
murs.

If the defendant demur, the plaintiff rarely delivers a joinder, but merely adds it in making up the demurrer book. If the plaintiff will not join in demurrer, the defendant's attorney may demand a joinder in demurrer of the plaintiff's attorney or agent(d), who must, in four days, exclusive of service, (unless a further time be granted by a judge), deliver a joinder in demurrer, or the defendant may sign judgment of *nonpros*.

Dowl. 324, S. C.

(s) *Edwards v. Greenwood*, 5 Bing. N. C.

476.

(t) *Neal v. Richardson*, 2 Dowl. 89.

(u) *Curtis v. Headfort*, 6 Dowl. 496.

(v) *Undershell (or Underhill) v. Fuller*, 1 C. M. & R. 900; 5 Tyr. 392; 3 Dowl. 495, S. C.

(x) *Chevers v. Parkington*, 6 Dowl. 75.

(y) *Jackson v. Cawley*, 6 Dowl. 380; and see as to averment of time in the account stated, *Leaf v. Lees*, 7 Dowl. 189.

(z) Before this rule, in the Q. B., when either party demurred he obtained a rule from the master, and entered it with the

clerk of the rules for the opposite party to join in demurrer, a copy of which rule was duly served. In the C. P., a rule to join in demurrer was given by the secondaries in like manner as the rule to plead, and a joinder in demurrer must have been demanded before judgment.

(a) *Billing v. Kightley*, 12th June, 1839, C. P.: see *Baylis v. Hayward*, 3 Dowl. 533.

(b) *Jones v. Key*, 2 Dowl. 265; 2 C. & M. 340, S. C.

(c) *Vernon v. Hodgins*, 4 Dowl. 654.

(d) See the form of the demand, Chit. Forms, 302.

The form of a joinder in demurrer is directed by the rule of *H. T.*, 4 *W.* 4, r. 14, to be as follows:—"The said plaintiff [or defendant] says that the declaration [or plea, &c.] is sufficient in law." *Engross it on plain paper, and deliver it to the opposite attorney, or agent.*

By *R. H.*, 4 *W.* 4, "to a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof."

Notice of Inquiry.] By a rule of all the courts of *H. T.*, 2 *W.* 4, r. 59, "in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer" (c). In most cases, especially where there is no argument to be had on the demurrer, it is advisable to give this notice where an inquiry is necessary before judgment, as it may materially expedite the plaintiff's execution, in the event of a judgment in his favour.

Demurrer Book.] The demurrer book is made up by the attorney (f) on plain paper, and where the demurrer is to the whole declaration or other pleadings, is the same precisely as the issue on an issue in fact, as far as the entry of the pleadings inclusive (g). Formerly it concluded with a *curia advisari cuit*,—but this is no longer necessary or proper, since the rule of *H. T.*, 4 *W.* 4, r. 2, ante, Vol. I. p. 336, abolishing the entry of continuances (h). Where the demurrer is to part only of the declaration or other pleadings, the demurrer book is the same; but those parts only of the pleadings to which the demurrer relates are to be copied into it; and if any other part be copied therein, the costs thereof shall not be allowed on taxation, either as between party and party, or as between attorney and client (i). Insert the names of the counsel who have signed the pleadings on both sides (k). Deliver a copy of this demurrer book to the opposite attorney or agent. It is kept by him, there being no occasion to return it, as was formerly the practice upon a rule for that purpose obtained from the clerk of the papers (l).

If there be also issues in fact as well as in law, and it is intended to try the issue in fact before the demurrer shall be determined, then make up the issue as usual, copying all the

(e) See the former practice and old rules, Tidd, 9th ed. 574: Jervis's Rules, 77. See a form of notice, Chit. Forms, 302. As to the time and form of the notice, see post, 714.

(f) By *R. H.*, 4 *W.* 4, r. 5, "the issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the court."

(g) See ante, Vol. I. 199, &c.

(h) See the form of demurrer book, Chit. Forms, 302.

(i) *R. H.* 8 & 9 *G.* 4, 7 *B.* & *C.* 642; 1 *M.* & *R.* 662, *Q. B.*; 1 *Moo.* & *P.* 401; 4 *Bing.* 449, 450, *C. P.*; 2 *Y.* & *J.* 530. *Exch.*

(k) *K. B.* & *C. P.*, & *R. M.*, 9 *G.* 4, *Exch.*: *R. E.*, 18 *Car.* 2, 1666, *K. B.*

(l) See *Baylis v. Hayward*, 3 *Dowl.* 533.

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PART II.Fact and in
Law.

Better, in general, to have
Demurrer
argued first.

pleadings, demurrer and joinder, and, immediately after enter an award of a *venire* as well to try the issues in fact, as to assess contingent damages upon the issue in law, if it be found for the plaintiff (*m*). And in such case, all the proceedings, not only as to the issue in fact, but as to the issue in law also, must be entered on the aforesaid *Nisi Prius* record, when you are preparing for trial of the issue in fact, in the same order as they appear in the issue (*n*). If the demurrer has been determined *before* the trial of the issue in fact, the judgment should be stated on the issue (*o*) and *Nisi Prius* record. When there are thus several issues in law and in fact, it is optional with the plaintiff which he will have determined first (*p*); and he may make up his issue or demurrer book accordingly. It is, in general, preferable to have the demurrer argued first, especially if the demurrer would put an end to the whole action. And where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact on the other two, the court, upon application of the defendant, ordered the demurrer to be argued first, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions (*q*). Where there are several issues in law and in fact, and the issues in fact are tried first, if the plaintiff be nonsuit, contingent damages cannot be assessed for him on the demurrer (*r*). If the judgment on the demurrer be in favour of the plaintiff, and the pleading on which it was given cover his whole cause of action, he may execute an inquiry, or where the cause of the action admits of it, get the damages assessed by the court, and afterwards enter a *nolle prosequi* as to the issue in fact (*s*). When it is certain that the issue in fact will be determined in favour of the plaintiff, and that the demurrer must also be determined for him, or that the latter may be safely abandoned, then it may be advisable first to try the issue in fact (*t*).

No Entry on
Record before
Judgment.

Formerly it was the practice to enter the proceedings on record, and carry in and docket the roll before the demurrer was argued, as was the analogous practice of entering the issue before a trial: but since the recent rule of *H. T.*, 4 *W. 4*, *r.* 15, by which it is ordered that "the *entry of proceedings* on the *record for trial*, or on the *judgment roll*, (*according to the nature of the case*), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any *prior entry* made or supposed to be made on *any roll or record* whatever," this is no longer necessary or proper (*u*).

Copies of De-
murrer book

By rule of all the courts of *H. T.*, 4 *W. 4*, *r.* 17, "*four clear days* (*x*) *before the day appointed for argument, the*

(*m*) See form of this award of the *venire*, Chit. Forms, 44.

(*n*) Imp. B. R. 47.

(*o*) See the form, Chit. Forms, 47.

(*p*) *Duberley v. Page*, 2 T. R. 394; 2 Saund. 300 n. (3); *Bird v. Higginson*, 5 A. & E. 83.

(*q*) *Burdett v. Colman*, 13 East, 27; see, however, *Bird v. Higginson*, 5 A. & E. 83.

See *post*, 665, as to amendment.

(*r*) *Snow v. Como*, 1 Str. 507.

(*s*) *Post*, 716.

(*t*) Chit. Sum. Prac. 144.

(*u*) See *Hodges v. Diley*, 7 Dowl 555.

(*x*) See the former practice, R. T., 40 G. 3: 1 East, 131; Tidd, 9th ed. 738; Tidd, New Prac. 451; and in Exch. *Darker v. Darker*, 2 Dowl. 88.

to be delivered
to Judges.

plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, (as the case may be), and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court, next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, [now since the 7 W. 4 & 1 V. c. 30, in either court one of the masters], a sufficient sum to pay for such copies" (y). If a cause be entered for argument on a Tuesday, the copies of the demurrer book must be delivered to the judge on the preceding Thursday; and if entered for argument for a Friday, then on the preceding Saturday. The party who delivers his books in proper time, should, on the following morning, search at the chambers of the other judges, to ascertain if his opponent has delivered his copies, in order that he may be prepared in case of his deponent's default with copies for the other judges on that day. Pay to each judge's clerk his fee with the demurrer book (z). It has been decided, that if a party seek to make his opponent pay the costs of copies of demurrer books, he must deliver them on the day after the time for his opponent's delivering them expires (a). An affidavit, stating the omission by one of the parties to deliver two copies of the demurrer book to the judges, whereupon the opposite party delivered such copies, for which he has not been paid, will not entitle him to object to the other being heard, unless notice has been given of the intention to make such objection, so as to give such party an opportunity of answering the affidavit (b). If all the demurrer books are not delivered to the judges by one party or the other, the case will be struck out of the paper (c). But where the defendant neglected to deliver his demurrer books, and did not appear at the argument to support his pleadings, but had offered to give a *cognovit*, the court gave judgment for the plaintiff without requiring the delivery of the defendant's demurrer books (d).

There is a rule in the Queen's Bench, (*R. E.*, 2 J. 2, *R. M.*, 38 G. 3), that "in all books to be delivered to the judges, the exceptions intended to be insisted upon in argument should be marked by the party who objects to the pleadings in the margin of the books he delivers," and he should leave copies of such exceptions with the other two judges (e). This rule is followed, in practice, in the Exchequer. There are also similar rules in the Common Pleas, the last of which (*H. T.*, 11 G. 4, and

Points for
Argument to
be stated in
the Margin.

(y) See *Darker v. Darker*, 2 Dowl. 88. Formerly, if either party neglected to deliver the books, and the other delivered all, the latter, it seems, must have moved for judgment upon the demurrer without argument, as the former could not be heard. (1 Sellon, 336: *R. v. Forman*, 11 Price, 161: *R. M.*, 17 Car. 1: *sed vide Fulham v. Bagshaw*, 1 B. & P. 292).

(z) See Chap. Prac. 3 Adda. 50.

(a) *Fisher v. Snow*, 3 Dowl. 27.

(b) *Sandall v. Bennett*, 4 Nev. & M. 89; 2 A. & E. 204, S. C.

(c) *Abraham v. Cooke*, 3 Dowl. 215; and *MSS.*, E. 1814: but see *Somers v. Miller*, 2 H. & W. 117.

(d) *Scott v. Robson*, 2 C., M. & R. 29; 5 Tyr. 717, S. C.

(e) *Per Lawrence, J.*, in *Apleton v. Bucks*, 1 Smith, 361; 5 East, 148, S. C.

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see *H. T.*, 48 *G.* 3) orders, that "in all special arguments in this court notice in writing of the points which are intended to be insisted upon by each of the parties, be delivered to the judges at their chambers *two* days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the judges, or on separate paper: and that each of the parties do within the same time leave a copy of such notice at the chambers of the lord chief justice, to be delivered to the adverse party upon his application." It has also always been the practice in that court, *if each party intends to take objections to the other's pleadings, that each should state his objections in the margin of his demurrer books*, otherwise he cannot enter into them upon the argument (*f*); and this practice is adopted in the other courts (*g*). The Court of Common Pleas lately intimated, that, if the party demurring omitted thus to state his objections in the margin, they would give judgment against him without argument (*h*). And it has been intimated by the Court of Exchequer, that they will not have an argument on an objection, even to any of the former pleadings, unless it be stated in the margin of the demurrer book (*i*). But the Court of Queen's Bench, in one instance, postponed a case in order that an objection might be stated in the margin (*k*).

Brief for
Counsel.

A copy of the demurrer book should also be made out for and delivered to counsel, to which you may add such observations as you think necessary. Mark on the back of it when the demurrer will be argued.

Argument.

Argument.] By rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 6, "no motion or rule for a *concilium* (*l*) shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, [now since the 7 *W.* 4 & 1 *V. c.* 30, in either court one of the masters], upon payment of a fee of one shilling; and notice thereof shall be given forthwith by such party to the opposite party." Where the defendant, two days before the end of term, demurred for the purpose of gaining time, the court allowed the case to be set down for argument on the last day of term, and refused to allow the defendant to withdraw the demurrer and plead the general issue (*m*); but, in ordinary cases, the notice must be given in sufficient time to enable the opposite party to prepare his demurrer books, otherwise the court will refuse to hear the demurrer, and, probably, allow the objecting party his costs of appearing to make the objection (*n*). *Set down the demurrer for argument, and give notice thereof accordingly to the opposite attorney or agent* (*o*).

(*f*) See *Clarke v. Davies*, 7 Taunt. 72: *Bayley v. Horman*, 3 Scott, 384.

(*g*) See *Darling v. Gurney*, 2 Dowl. 101.

(*h*) *Grottick v. Phillips*, 3 Moo. & Sc. 133; 9 Bing. 723, *S. C.*: and see *Brogden v. Marriott*, 2 Scott, 708.

(*i*) *Parker v. Riley*, 3 M. & W. 230.

(*k*) *Coleby v. Graves*, cited by Knowles (*amicus curiæ*) in 3 M. & W. 235: and see

Brookes v. Humphries, 8 Law Journ., N. S., C. P., 34, *S. P.*

(*l*) Or *dies concilii*, or day to hear counsel of both parties.

(*m*) *Wilson v. Tucker*, 2 Dowl. 83: *Coo-per v. Hawkes*, 1 C. & J. 219.

(*n*) *Britten v. Britt n.*, 2 Dowl. 239.

(*o*) See form of notice, Chit. Forms, 303.

Afterwards, upon some "paper day" in term, (*ante*, 95), the demurrer will be called on for argument, in the order in which it stands on the paper. A special application for an adjournment must be made two days before the time appointed for argument. All causes remaining undetermined at the end of the term will come on in the next term in the order they stand. In general, no argument will be heard on the first four or last four days of the term (*p*). On the argument, the counsel for the party demurring is first heard in support of the demurrer; next, the counsel for the other party is heard in answer; and, lastly, the former counsel is heard in reply. One counsel only on each side (usually the junior, where there is more than one) is allowed to argue the demurrer. The court then deliver their opinion; according to which, the judgment is afterwards entered for the plaintiff or the defendant.

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PART II.

Time and
Manner of
Argument.

Formerly, those demurrers which were not intended to be argued were set down in a paper called the "common paper," and were called on and disposed of before a single judge in the early part of the day; those which were to be argued, were set down in the "special paper," and argued before the full court. But now all demurrers to which a joinder in demurrer is added are supposed to be arguable, and are set down for argument accordingly in the special paper. If not arguable, the opposite party ought to have applied before joining in demurrer to have the demurrer set aside as frivolous, and as to which see *ante*, 659.

Common
Paper done
away.

Amendment, &c.] As to the cases in which the parties will be allowed to amend after a demurrer, and before argument, see *post*, Book IV. Part I. Ch. 28. Frequently, on the case coming on for argument, when the judges, on perusal of the demurrer books or hearing counsel, think that the objection is well founded, they will express that opinion, and suggest to the opposite counsel the expediency of amending, and which, if acceded to, will be permitted on payment of costs. But, if counsel persist in arguing in support of the pleading, and the court have delivered their opinion, they will seldom afterwards permit an amendment (*q*). Under particular circumstances, however, the court have allowed a defendant to withdraw his demurrer, and to plead *de novo*, even after argument (*r*), the defendant producing an affidavit, distinctly shewing a ground of defence upon the merits (*s*). If there be issues in law and in fact, and the latter be tried first, and contingent damages assessed as to the demurrer, the court, it seems, will not, in that case, allow either of an amendment or of the demurrer being withdrawn (*t*).

Amendment,
&c.

Judgment.] *In the evening of the day of, and after the argument, obtain from one of the masters a peremptory rule "that*

Judgment.

(*p*) M. T., 30 G. 2, *ante*, 95, 96: 2 Wils. 173; *Potten v. Bradley*, 2 Moo. & Loft, 370. P. 78.

(*q*) Tidd, 710: Chit. Sum. Prac. 148. (*s*) *Bramah v. Roberts*, 1 Scott, 364; 1 Bing. N. C. 481, S. C.: see *Morant v. Giddings v. Giddings*, Say 316; *Hunt v. Sign*, 2 M. & W. 95. (*t*) *Robinson v. Raley*, 1 Burr. 322.

(*r*) *Howell v. M'ivers*, 4 T. R. 690; *Giddings v. Giddings*, Say 316; *Hunt v. Puckmore*, Barnes, 155; *Collins v. Collins*, 2 Burr. 820; 2 Ld. Ken. 530, S. C.: *Anon.*,

BOOK II.
PART II.

How Signed.

judgment be entered for the plaintiff or defendant," as the case may be. Serve a copy thereof on the opposite attorney or agent. Judgment upon demurrer is interlocutory or final, in the same manner, and in the same cases, as judgment by default (*u*). If interlocutory, proceed to execute your writ of inquiry, or to have principal and interest computed by the master, according to the nature of the case, and sign final judgment, and tax your costs, as directed post, 702. We have seen, ante, 661, that the plaintiff may give notice of inquiry on the back of the demurrer when he demurs, or on the back of the joinder when the defendant demurs. If the judgment be final, sign it with the master, as directed post, 702, for which the rule above mentioned will be his authority. As to the necessity of suggesting breaches upon the roll, after judgment upon demurrer in debt on bond, and the mode of making the suggestion, and of proceeding to an inquiry thereon, see post, Ch. 4, Sect. 3.

Entry of on Roll, where there are Issues in Law only.

In entering the judgment on the roll, if there be but a single issue, then immediately after the joinder in demurrer, which concludes the issue, enter the appearance of the parties, and the judgment (*x*). If the judgment for plaintiff upon the demurrer be merely interlocutory, and a writ of inquiry executed, then follow on the roll the award of the writ of inquiry, an entry of the return of it, and the finding of the inquest; and, lastly, an entry of the final judgment, as mentioned *infra*. As to the judgment for plaintiff upon demurrer to a plea in abatement, see ante, 656 (*y*). If the judgment on a single issue be for the defendant, then immediately after the entry of the joinder in demurrer, as above, enter the appearance of the parties, and a judgment of *nil capiat per breve* (*z*). This is, of course, a final judgment, and gives the defendant his costs.

Entry of where there are Issues in Fact also.

When there are several issues in law and in fact, if the issues in fact were tried before the determination of the demurrer, then immediately after the award of the *venire*, (as mentioned ante, 661), enter the *jurata ponitur in respectu* and *postea*, as directed Vol. I. 338; then enter the appearance of the parties, and judgment upon the demurrer; and lastly, the final judgment (*a*). But when, of several issues in law and in fact, the issues in law have been tried first, and found for the plaintiff, then immediately after the joinder in demurrer enter the judgment on the demurrer; then an award of a *venire*, as well to try the issues in fact, as to inquire of the damages upon the issue in law; then the *jurata ponitur in respectu*, and *postea*, as ante, 328; and lastly, the final judgment (*b*). But if the plaintiff be content to take damages upon the judgment on demurrer only, he may execute a writ of inquiry as to that judgment, or, in the case of a bill of exchange or the like, may have it

(*u*) See post, 701.

(*x*) See forms of the entry, Chit. Forms, 304 to 309. See *Attwood v. Burr*, 1 Salk. 402; 2 L. Raym. 821, S. C.

(*y*) See the forms, Chit. Forms, 304.

(*z*) See the form on demurrer to a declaration or replication, Chit. Forms, 303; the like on demurrer to a plea or rejoinder, Id. 304; the like on demurrer to a

plea in abatement, Id. 304; the like, on demurrer to a replication to a plea in abatement, Id. 305.

(*a*) The entry of any continuances, either by *curia advisari vult*, or by *vicecomes non misit breve*, is no longer requisite. (R. H., 4 W. 4, r. 2).

(*b*) See the form of this entry, 2 Saund. 298—301; Chit. Forms, 305.

referred to the master, and he may enter a *nolle prosequi* as to the issues in fact (c).

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If a defendant plead several pleas to the same or several counts of a declaration, and the plaintiff demur to some of the pleas, and take issue upon others; if the defendant succeed upon any of the pleas demurred to, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact, should they be found for him (d); but the only judgment that shall be entered is *nil capiat per breve*.

Where Defendant succeeds on one of several Pleas to Action brought.

Costs.] By stat. 8 & 9 W. 3, c. 11, s. 2, if either plaintiff or defendant have judgment upon demurrer, he shall be entitled to costs, and may have execution for the same by *ca. sa.*, *fieri facias*, or *elegit*. This statute, however, did not extend to demurrers in abatement, nor to actions where the plaintiff would not be entitled to damages if he had a verdict (e). But now, by the Law Amendment Act (f), "where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

Costs.

Generally.

In a recent case, where, to a declaration in two counts, defendant pleaded two pleas to the first count and one to the second, issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to: the plaintiff took the issues in fact to trial, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed; and for the defendant on the issue on the second count: afterwards, on the demurrer to the other plea to the first count, the defendant had judgment: Held, that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded, including (in addition to the pleadings) briefs, witnesses, &c.; and that no objection arose from his having tried the issues in fact before that in law, especially as a judge at chambers had refused an application by the defendant to order the trial of the issues in fact to be postponed till judgment was given on the demurrer (g).

Where there are Issues of Fact and Law.

Where there were several issues in fact, and a demurrer to a rejoinder, the defendant had leave to amend upon payment of costs; and upon taxation of the costs, the briefs and demurrer-books were charged for, as containing all the issues in fact, as well as at law; it was held, that the master was right in disallowing the charges so far as related to the issues in fact (h).

A cause was entered in the paper for argument;—a defendant having demurred to a replication, the plaintiff got the case

Costs of Attendance

(c) 1 Saund. 109, n. (1): and see *Fleming v. Langton*, 1 Str. 533; *Anon.*, 1 Saik. 210: *ante*, 662: *post*, 723. See the form, Chit. Forms, 308, &c. See the form of the jury process, where there are issues in fact and in law, Chit. Forms, 69.

(d) 1 Saund. 80, n. (1). Where the defendant obtains judgment on one of several pleas going to the whole cause of

action, the court will allow him to strike out the other plea on paying costs of the issues joined on them. (*Young v. Beck*, 3 Dowl. 804).

(e) *Hullock*, 145.

(f) 3 & 4 W. 4, c. 42, s. 34: and see 3 Rep. C. L. Com. 25, 76.

(g) *Bird v. Higginson*, 5 A. & E. 83.

(h) *Jones v. Roberts*, 2 Dowl. 374.

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PART II.
where no
Joinder.

put into the paper as for argument, and the defendant came prepared to argue the point; but it appeared that the plaintiff had not joined in demurrer, and, of course, no paper books were delivered to the judges; it was held, that the defendant was not entitled to his costs of appearing for argument (i).

Execution. *Execution.*] The execution is the same as in other cases. (*See ante*, 395 to 456).

(i) *Howorth v. Hubbersty*, 3 Dowl. 457.

BOOK II.

PART III.

PROCEEDINGS UPON NUL TIEL RECORD.

- | | |
|---|---|
| <p>1. <i>When a Record of the same Court is pleaded.</i>
 <i>Issue, &c.</i>, 669.
 <i>Trial</i>, 670.
 <i>Judgment, &c.</i>, <i>id.</i>
 <i>Costs</i>, 671.
 <i>Execution, id.</i>
 <i>Amendment, id.</i></p> | <p>2. <i>When a Record of another Court is pleaded.</i>
 <i>Plea of Judgment recovered in another Court</i>, 672.
 <i>Issue, id.</i>
 <i>Certiorari, id.</i>
 <i>Trial and subsequent Proceedings</i>, 673.</p> |
|---|---|

1. *When a Record of the same Court is pleaded.*BOOK II.
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Issue, &c.] ON a record of the same court being pleaded, when the plaintiff replies *nul tiel* record, or when he replies to a plea of *nul tiel* record, he concludes his replication that the record may be inspected; and a day is accordingly given to the parties for that purpose (*a*). As this completes the pleadings, you may make up the issue and deliver it as in ordinary cases (*b*). It is the same in form as in an issue triable by the country (*c*), excepting the conclusion (*d*).

The plaintiff, however, when the defendant pleads a record of the same court, *instead of replying nul tiel record, may demand of the defendant a note in writing of the term and number-roll whereon such judgment or matter of record is entered, or matter of record is entered or filed, or, in default thereof, the plea is not to be received, and the plaintiff may sign judgment* (*e*). But this cannot be done when the defendant pleads a record of another court; and as to which, see *post*, 672.

Where the plaintiff replies *nul tiel* record, he should, in the Queen's Bench, *obtain from one of the masters a rule to produce*

Issue. Form
of, &c.Demand of
Term and
Number of
the Roll.Rule to pro-
duce the Re-
cord.

(a) See the form, Chit. Forms, 311.

(b) R. H., 4 W. 4, r. 5, *ante*, Vol. I. 199. It has been held in the Common Pleas, that, as the issue is complete by the prayer of the inspection of the record, though the defendant demur to the replication, the plaintiff may, nevertheless, sign judgment on the production of the record on the given day. (See *Tipping v. Johnson*, 2 B. & P. 302; *Jackson v. Wickes*, 2 Marsh. 354; 7 Taunt. 30, S. C.)

(c) See Vol. I. 199.

(d) See the form, Chit. Forms, 312.

(e) R. T., 5 & 6 G. 2, Q. B.: Imp. C. P. 7th ed. 292; Tidd, 9th ed. 742; Keil, 95, 96; *Thenbald v. Long*, 1 L. Raym. 347; Holt, 557, S. C.: *Cremier v. Wickett*, Id. 550; 12 Mod. 350, S. C.: *Wilson v. Ingolsby*, 2 Id. 1179; *Hunter v. Wiseman*, 2 Str. 823; 1 Saund. 92, n. (3). See a form of demand, Chit. Forms, 311.

BOOK II.
PART III.Notice by
Plaintiff of
Production
of.

the record (*f*); enter it with him, and serve a copy of it on the defendant's attorney or agent. It is a four-day rule. In the Common Pleas and Exchequer, he obtains a rule for judgment, and serves a copy on the defendant's attorney or agent.

When the plaintiff replies to a plea of *nul tiel* record, he must, in the Queen's Bench, give a notice in writing to the defendant's attorney or agent that he will produce the record on the day therein mentioned, (*g*). In the Common Pleas and Exchequer, he obtains a rule for judgment, and serves a copy on the defendant's attorney or agent.

Trial.

Trial.] Let the party who has to produce the record bespeak it at the Treasury, and desire that it may be brought into court, upon the day appointed by the notice or rule above mentioned. Let the party entitled to judgment instruct counsel to move for it; and the opposite party, if he contest it, will instruct counsel to oppose the motion. On the motion being made, the master will declare whether the record is in court or not. If the record be not produced, or if produced and found not to maintain the plea, judgment of failure of record is given for the opposite party (*h*), otherwise judgment that the party hath perfected the record will be given for the party who pleaded it. If a record be produced which ought not to be so, the course will be to apply to the court from which the record is, to quash the roll (*i*). Upon a plea in abatement of another action pending in another court for the same cause, concluding with a *prout patet per recordum*, it is sufficient to satisfy the plea, if a record of a writ be produced (*k*). But where the plaintiff issued two writs, one out of the Common Pleas, which was never served, and the other out of the Exchequer, on which he proceeded to declare; and the defendant pleaded to the action in the Exchequer, another action pending for the same cause in the Common Pleas; the plaintiff replied *nul tiel* record, and served the defendant with a rule to produce the record; and the defendant having made up a roll from the *præcipe* on the file of the Common Pleas, that court ordered it to be cancelled with costs (*l*). And where a defendant who had been sued in the Common Pleas signed judgment of *nonpro*s, after which the plaintiff proceeded against him in another action for the same cause in the King's Bench, the latter court would not permit him to abandon his judgment of *nonpro*s, and plead the pendency of the former action in the Common Pleas (*m*).

Judgment,
&c.
For Plaintiff.

Judgment, &c.] Judgment for the plaintiff is interlocutory or final in the same manner, and in the same cases, as judgment upon demurrer or default (*n*). If interlocutory, make an incipitur on plain paper, and take it to the master, as directed post, 735, and he will sign judgment. Then proceed to sue out and execute your writ of inquiry, or have principal and interest

(*f*) See the form, Chit. Forms, 312: *Begbie v. Grenville*, 8 Dowl. 502. A notice by plaintiff on defendant to produce the record would be irregular. (*Id.*)

(*g*) *Tidd*, 9th ed. 743. See the form, Chit. Forms, 312.

(*h*) *Innes v. Hay*, Fort. 353; *Rowell v. Dyon*, Lutw. 945; see *Munkenbeck v.*

Buskell, 4 Dowl. 139.

(*i*) *Kerbey v. Siggers*, 2 Dowl. 659; *Id.* 813.

(*k*) *Kerbey v. Siggers*, 2 Dowl. 813; 4 M. & Scott, 481. S. C.

(*l*) *Kerbey v. Siggers*, 2 Dowl. 659.

(*m*) *Pepper v. Whalley*, 3 Dowl. 579.

(*n*) See post, 701.

computed by the master, according to the nature of the case, and sign final judgment, as directed post, 720, &c. (p). In the court of Queen's Bench or Exchequer it is not necessary to have a rule before interlocutory judgment can be signed. If the judgment be final, write out a præcipe of a rule for judgment on a slip of paper (q), and take and enter it with the master; and in the Common Pleas, you must get the master, upon the expiration of the rule, to certify on the back of it that no cause has been shewn. The rule expires in four days exclusive of the day on which it is entered, and inclusive of the last day, unless the last day be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving; in which case that day would not be reckoned as one of the four (r). After the expiration of these four days, make an incipitur on plain paper, and take it to the master, who will sign the judgment; give the opposite party the usual one day's notice of your intention to tax the costs (s), and, on the day named for such taxation, take the judgment paper to the master, who will tax the costs, and mark them on it. You may then sue out execution (t). Notice of taxation of costs is not requisite where the plaintiff has appeared for the defendant (u). Judgment upon a replication of nul tiel record, to a plea in abatement is, we have seen, (ante, 656), not final, but merely a respondeas ouster.

Judgment for the defendant is, of course, final; and signed as above directed, a rule for judgment having been previously given. For Defendant.

In entering the proceedings upon the roll—if the issue be single, then, immediately after the conclusion of the issue, enter, in a new paragraph, the appearance of the parties and the judgment; and if the judgment be interlocutory, and the writ of inquiry have been executed, enter the award of the writ of inquiry, the return to it, and the finding of the inquest, and, lastly, the final judgment. But where there are several issues, some to be tried by the record, others by the country, the entries may be made in the manner directed ante, 666, as to proceedings upon a demurrer, mutatis mutandis (x). Entry of Proceedings on the Roll.

Costs.] The party, in whose favour judgment is given, is, in general, entitled to costs as on trials by jury; however, in debt on judgment recovered by plaintiff, (in which this issue frequently arises), the plaintiff will not be entitled to costs, unless the court or a judge thereof shall otherwise order (y). Costs.

Execution.] The execution is the same as in ordinary cases. Execution.

Amendment.] When, in consequence of variance between the record produced and that stated in pleading, the defendant is entitled to judgment of failure of record, the court will not permit an amendment to be made at the trial by the Amendment.

(p) See *Moses v. Compton*, 6 M. & Sel. 381.

(q) See the form of the memorandum, Chit. Forms, 314.

(r) R. H., 2 W. 4, r. 8, ante, 93.

(s) See ante, 334.

(t) See the forms of judgment for plaintiff on nul tiel record, Chit. Forms, 315; of a judgment for defendant on nul tiel

record, Id. 309.

(u) See R. H., 4 W. 4, r. 17, post, Book IV. Part I. Chap. 30.

(x) See as to the forms, Chit. Forms, 315. See as to the form of the jury process, where there are several issues, some to be tried by the country, and others by the record, Id. 69.

(y) 43 G. 3, c. 46, s. 4.

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PART III.

record, so as to prevent the defendant from obtaining judgment; but on a special application for that purpose, the plaintiff will be allowed to amend, even after judgment. Thus, an amendment has been allowed after judgment of failure of record, where, in an action on a judgment, the declaration stated it to have been recovered in a term different from that which appeared on the record, and that it was against one defendant only, where it was against more than one (z). Also, where in debt on a recognisance of bail, the declaration stated it to have been entered into in an action of debt, and, on trial by the record, it appeared to have been in an action of *assumpsit* (a).

2. When a Record of another Court is pleaded.

Plea of Judgment recovered in another Court.

Marginal Note, in Plea of Number of Roll.

Plea of Judgment recovered in another Court.] The plea of judgment recovered in another court used to be frequently adopted for delay, when, in truth, no such judgment ever existed. To prevent this, the rule of *H. T.*, 4 *W.* 4, r. 8, requires, that "where a defendant shall plead a plea of judgment recovered in another court, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge." (b). The rule applies only to a plea of judgment recovered, strictly so called, and not others, such as a plea by an executor of judgments recovered against the testator, whereby the assets are absorbed (c).

Issue.

Issue.] Let the issue be made up and delivered as in ordinary cases (d). You cannot, in this case, demand a note in writing of the term and number of the roll, &c., as mentioned *ante*, 669; but you must plead *nul tiel* record, and so proceed to trial.

Certiorari.

Certiorari.] The only way of bringing in the record is by writ of *certiorari* (e). This writ must be sued out by the party who has to produce the record, directed to the chief justice, judge, or officer of the court below, in whose custody the record is supposed to be (f). If it be the record of an inferior court, it may be sued out either in the court in which the action is pending, or with the cursitor; if the latter, it is an original writ, tested in or out of term, returnable on a general return

(z) *Rastall v. Stratton*, 1 H. Bl. 49.

(a) *Munkenbeck v. Bushnell*, 4 Dowl. 139; *Rastall v. Stratton*, 1 H. Bl. 49: see *Blackmore v. Fleming*, 7 T. R. 447 a.

(b) See form of plea and marginal notes, Chit. Forms, 310.

(c) *Power v. Izod*, 3 Dowl. 140; 1 Bing.

N. C. 304; 1 Scott, 119, S. C.

(d) See *Newbury v. Strudwick*, Barnes, 335. See the forms, Chit. Forms, 46.

(e) *Hewson v. Brown*, 2 Burr. 1034.

(f) See the form of it, Chit. Forms, 312.

day, and made out by the cursitor, upon your furnishing him with a *præcipe*. If sued out in the court in which the action is pending, it is a judicial writ, tested in the name of the chief justice or chief baron on some day in term, and returnable on a day certain in term, and signed and sealed as in ordinary cases. It is sufficient to return the tenor of the record upon this writ, without certifying the record itself (*g*). But if the record be the record of a superior court, as, for instance, if the action be in the Common Pleas, and the record be one of the Queen's Bench, you must first sue out, with the cursitor, a *certiorari*, directed to the chief justice of the Queen's Bench, returnable in Chancery; and upon the record being certified into that court (*h*), an exemplification or transcript of it, under the seal of the Chancellor, will be sent into the court in which the action is pending, to be produced upon the day given (*i*). If the action be in the Queen's Bench, and the record be in the Common Pleas or Exchequer, it seems that you may proceed either by *certiorari* out of Chancery, and *mittimus* thereon, or by *certiorari* from the Queen's Bench in the first instance (*k*).

Trial and subsequent Proceedings.] Give notice of your bringing in the record, or rule the other party to bring it in, and proceed to trial, judgment, &c., as directed *ante*, 669, 670.

Trial and
subsequent
Proceedings.

(*g*) *Hambledon v. Lancashire*, 3 Salk. 296; *Gilb. Execution*, 143.

(*i*) See *Luttrell v. Lea*, Cro. Car. 297.

(*k*) See the form, *Chit. Forms*, 312, 313. and *Tidd*, 268.

BOOK II.

PART IV.

PROCEEDINGS UPON JUDGMENT BY CONFESSION OR DEFAULT.

CHAPTER I.

BOOK II.
PART IV.

JUDGMENT BY COGNORIT.

The Cognovit, 674.
In what Cases filed, &c. 677.
Judgment on, when and how Signed,
 678.
Execution on, 680.

*Cancelling Cognovit and setting
 aside Execution, &c., id.*
Implied Confession of Action,
 681.
Writ of Inquiry, 681.

The Cognovit.

What.

At what State
of Proceed-
ings given.

The Cognovit.] WHERE the defendant has no available defence to make to the action, it is not unusual for him, instead of proceeding to trial, or of allowing judgment to pass against him by default, to give the plaintiff a *cognovit* or written confession of the action, usually upon condition that he shall be allowed a certain time for the payment of the debt or damages, the amount of such debt or damages being, in general, first ascertained and agreed upon. A *cognovit* is supposed to be given by the defendant in court, and it impliedly authorizes the plaintiff's attorney to do everything necessary for proceeding with the action in order to obtain judgment, and, consequently, to enter an appearance, if necessary (*a*). A *cognovit* may be given at any time after the process is sued out, and even before it is served (*b*), or before the plaintiff has declared (*c*); but this is not very usual; moreover, if the defendant be a trader, and subject to the bankrupt laws, an execution under the *cognovit* would come within the meaning of the 108th section of the Bankrupt Act, (6 *G.* 4, *c.* 16), and, probably, be unavailable, unless the *cognovit* were given *after* declaration, as required by the 1 *W.* 4, *c.* 7, *s.* 7 (*d*). A *cognovit* may be given and will be valid, though the writ by which the action was commenced has ceased, by lapse of time, to be in form against the defendant (*a*).

(*a*) *Richardson v. Daly*, 4 M. & W. 384; 7 Dowl. 25, S. C.

(*b*) *Kirby v. Jenkins*, 2 Tyr. 499; and see *Wade v. Swift*, 8 Price, 513.

(*c*) *Morley v. Hall*, 2 Dowl. 494; *Clarke v. Jones*, 3 Id. 277; *Webb v. Aspinall*, 7

Taunt. 701; 1 Moore, 428, S. C.; and see *Davis v. Hughes*, 7 T. R. 207, n. (*a*): *Hurst v. Jennings*, 5 B. & C. 658; Tidd, 9th ed. 559.

(*d*) *Ante*, 433.

CHAP. I.

It should seem that one partner cannot bind his copartner by a *cognovit*, without his consent: at all events, after a partnership is dissolved, one of the partners has no power to bind the other by giving a *cognovit* to pay costs as between attorney and client (*e*). Where one of several parties to a *cognovit* signs after the others, his signing relates back to the time of their signing (*f*).

By one of several Defendants.

No prescribed form of *cognovit* is, in general, requisite (*g*). It ought, however, always expressly to shew the terms upon which it is given. If any agreement or understanding be entered into, contrary to the express terms of it, the court will not, in general, regard such agreement, but put the party to his remedy, if any, by action (*h*). Sometimes, however, the court will set aside a judgment entered up, and execution issued out, contrary to the express agreement or understanding of the parties at the time of confessing the judgment (*i*). Where the plaintiff, on the eve of trial, accepted from the defendant a *cognovit* for a certain sum payable at a future day, in full discharge of the action, and the master, on costs, allowed the plaintiff costs previous to the *cognovit*; the court refused to admit the plaintiff's affidavit, stating a verbal agreement, that he should have such costs in case the defendant made default in payment, and that he had made such default, and made the rule for the disallowance of such costs absolute (*k*).

Form of, and how affected by collateral Agreement.

By statute 3 G. 4, c. 39, s. 4, a *cognovit* which is to be filed according to that act (*post*, 677), to make it available against creditors, in the event of the bankruptcy of the defendant, if the same be given subject to a condition, such condition must be written on the same paper or parchment on which the *cognovit* is, before filing it, otherwise it will be void as against the assignees (*l*). This provision is extended in favour of the creditors of an insolvent debtor, by the 1 & 2 V. c. 110, s. 60 (*m*).

The Condition of it must be written on same Paper.

The *cognovit* generally contains an agreement upon the part of the defendant that no writ of error shall be brought, nor bill in equity filed (*n*); and if, notwithstanding this, the defendant does bring a writ of error, the allowance of such writ is no *supersedeas*, and will not prevent the plaintiff from charging him in execution (*o*). It frequently also contains an agreement to waive the necessity for a *scire facias* to revive the judgment, and such agreement has been considered binding

Agreement to waive Writ of Error and Sci Fa.

(*e*) *Rathbone v. Drakeford*, 4 Moo. & P. 57; 6 Bing. 375, S. C.: see *Brutton v. Burton*, 1 Chit. Rep. 707; *Stead v. Salt*, 10 Moore, 389; 3 Bing. 101, S. C.: *Adams v. Bankart*, 1 C. M. & R. 48; *Beckham v. Knight*, 4 Bing. N. C. 243.

(*f*) *Perry v. Turner*, 1 Dowl. 300; 2 C. & J. 89; 2 Tyr. 128, S. C.

(*g*) See *Hurst v. Jennings*, 5 B. & C. 650; 8 D. & R. 424, S. C. See the forms in debt, Chit. Forms, 318: in *assumpsit*, Id. 317; in ejectment, Id. 318. *Beckham v. Knight*, 4 Bing. N. C. 243.

(*h*) See *Anon.*, 1 Salk. 400.

(*i*) *Dillon v. Broune*, 6 Mod. 14; *Hatton v. Young*, 2 W. Bla. 943; *Woodmyn v. Ford*, 2 B. M., 1837; 2 Jurist, 1; *post*, 678.

(*k*) *Anon.*, 7 D. & R. 375.

(*l*) See *Bennett v. Daniel*, 10 B. & C. 500; *Green v. Gray*, 1 Dowl. 350.

(*m*) See *Morriss v. Mellin*, 6 B. & C. 446; 9 Dowl. & Ry. 503, decided before the 7 G. 4, c. 57.

(*n*) But this stipulation does not, it should seem, oust the superior courts of their jurisdiction. (See *Wade v. Rogers*, 2 W. Bla. 780; *Kill v. Holister*, 1 Wils. 129; *post*, 683). And see this stipulation commented on in the case of *Shaw v. Marquis of Worcester*, 4 Moo. & P. 21; 6 Bing. 387, S. C. It should seem from that case, that such stipulation would not deprive the defendant of taking advantage of the plaintiff's not executing a writ of inquiry, or of not suggesting breaches under the 8 & 9 W. 3, c. 11, when necessary. And see *Howell v. Stratton*, 2 Smith, 69.

(*o*) *Best v. Gompertz*, 2 Dowl. 395.

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PART IV.After Plea
pleaded.Of Part of
Action.

Stamp on.

on the defendant (*p*), though a doubt seems to have been thrown upon this by a more recent case (*q*).

If given after plea pleaded, it contains an agreement to withdraw the plea; in which case it is termed a *cognovit actionem relicta verificatione*, from the form of the entry of it upon the roll (*r*).

The *cognovit* may be of part of the cause of action, or of the entire; if of part, the plaintiff can only sign judgment for the part confessed, and proceed in the action as to the residue (*s*).

The *cognovit* may be written upon plain paper, if it contain no terms of agreement, to the amount of 20*l.*, between the parties; but if it contain such terms, as if it be conditioned for the payment of the debt, (to the amount of 20*l.* or more), or debt and costs (to that amount or more) by instalments (*t*), or the like, it must be written on a 20*s.* stamp. In a late case, it was held that a *cognovit*, on which judgment was not to be entered up, unless default should be made in payment of 18*l.* debt and interest from 26th October to day of payment, and costs on 16th February then next, required a stamp (*x*). A stipulation not to take advantage of the *cognovit* being given before declaration, does not render a stamp necessary (*y*). The want of, or a defect in, the stamp, will not render the *cognovit* unavailable, for a proper stamp may be procured on payment of the usual penalty (5*l.*), and this at any time, even after a motion to set aside a judgment entered up on it (*z*). But the master will not, in general, allow a *cognovit* to be filed, unless duly stamped.

Attestation by
an Attorney.

By a general rule of all the courts of *H. T.*, 4 *W. 4*, *r. 72*, “no warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon *mesne* process, shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney” (*a*). And by 1 & 2 *V. c. 110*, *s. 9*, after reciting that “it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a *cognovit actionem*, due information of the nature and effect thereof,” it is enacted, “that from and after the time appointed for the commencement of this Act,” [1st October, 1838,] “no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit* before the

(*p*) *Howell v. Stratton*, 2 Smith, 65: *Morris v. Jones*, 2 B. & C. 242; 3 D. & R. 603, S. C.: *Lee's Dict.* 2nd ed. 1228.

(*q*) *Heath v. Brindley*, 2 A. & E. 368.

(*r*) See the form, *Chit. Forms*, 318.

(*s*) 1 *Sellon*, 373; *Tidd*, 9th ed. 560.

(*t*) *Ames v. Hill*, 2 B. & P. 150: *Reardon v. Swanby*, 4 L. ast, 188; *Jay v. Warren*, 1 C. & P. 532; *Morley v. Hall*, 2 Dowl.

494: *Pitman v. Humfrey*, 2 Tyr. 500.

(*x*) *Pitman v. Humfrey*, 2 Tyr. 500.

(*y*) *Green v. Gray*, 1 Dowl. 350.

(*z*) See *Burton v. Kirkby*, 7 Taunt. 174; 2 Marsh. 480, S. C.: *Clarke v. Jones*, 3 Dowl. 277; *Rose v. Tomblinson*, Id. 49: *Pitman v. Humfrey*, 2 Tyr. 500.

(*a*) See the former practice, *Tidd*, New Pract. 288.

same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney" (*b*). And by the 10th sect. of the same act, "a warrant of attorney to confess judgment, or *cognovit actionem* not executed in manner aforesaid, shall not be rendered void by proof, that the person executing the same did, in fact, understand the nature and effect thereof, and was fully informed of the same." These sections and rules, and the decisions relating to them, will be found hereafter (*post*, 683, 684, 685) noticed, while treating of warrants of attorney.

In what cases Filed, &c. By stat. 3 G. 4, c. 39, s. 2, the *cognovit*, if the action be in the Queen's Bench, (or a copy if the action be in the Common Pleas or Exchequer), when given in a personal action, and an affidavit of the time of the execution thereof, must be filed [with the masters] within twenty-one days after its execution, to render it, or any judgment or execution thereupon, valid as against the assignees (*c*) of the defendant, unless judgment be signed and execution issued within the twenty-one days. The master's fee for the filing is 1s. (*d*). If the *cognovit* be made subject to a defazance or condition, such defazance or condition must, in order to make the *cognovit* effectual against the assignees (*e*), be written on the same paper or parchment on which the *cognovit* is written before the time when the same or a copy thereof respectively shall be filed (*e*). The same act, section 7, provides, that any person shall be entitled to have an office copy of the *cognovit*, upon paying for the same at the like rate as for an office copy of a judgment. By the 5th section of the act the masters shall keep a book, containing particulars of each *cognovit* filed, &c.

In what Cases
filed, &c.

Where a warrant of attorney was not filed, as directed by the 3 G. 4, c. 39, s. 2, *post*, 692, and execution issued *after* an act of bankruptcy, but more than two months before the commission issued, it was held not a case within the protection of 6 G. 4, c. 16, s. 81 (*f*); but whether it would have been within that act, if execution had been executed *before* any act of bankruptcy, has not been decided (*g*). A bond upon the face of it appeared to be conditioned for the payment of a sum certain; but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees to commence an action upon the bond, and proceed to judgment whenever they should think fit, and, upon judgment being obtained, to issue execution; and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were, or might thereafter become, due to them. A judgment having been entered up by virtue of this deed, the

Consequences
of not Filing

(b) See form of attestation, Chit. Forms, 317, 324.

(c) *Green v. Gray*, 1 Dowl. 350; *Bennett v. Daniel*, 10 B. & C. 500; 5 Man. & Ry. 444; *Morris v. Melin*, 6 Id. 44; 9 Dowl. & Ry. 503.

(d) 3 G. 4, c. 39, s. 6.

(e) 3 G. 4, c. 39, s. 4; *Bennett v. Daniel*, 10 B. & C. 500; *Green v. Gray*, 1 Dowl. 350.

(f) *Godson v. Sanctuary*, 1 Nev. & M. 52; 4 B. & Ad. 255, S. C.

(g) *Wilson v. Whittaker*, 1 M. & M. 8. It seems pretty clear that it would not, in such case, be inoperative as against the assignees; for the 3 G. 4, c. 39, merely paralyzes the *cognovit* as against the fiat, but does not give the fiat any power of overreaching the act of bankruptcy.

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obligees issued execution, without assigning breaches or executing a writ of inquiry; and the court held, that the indenture, by virtue of which the judgment was entered up, was in legal effect a *cognovit actionem*, within the meaning of the 3rd section of the statute 3 G. 4, c. 39; or, if not, that it was a contrivance to defeat the provisions of that statute; and this indenture not having been filed with the proper officer, within twenty-one days after its execution, nor judgment entered up within that period, as required by the statute, the court, upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn (*h*). The *cognovit*, though not filed, is not absolutely void, but only inoperative as against the assignees of the defendant should he become bankrupt or insolvent (*i*).

Entering
Satisfaction.

If the *cognovit* have been filed, as above mentioned, and the debt be afterwards satisfied or discharged, a judge, upon being satisfied of that fact, may order a memorandum of satisfaction to be written upon it (*j*).

In case of
Insolvents.

The Insolvent Debtors' Act (*k*) extends these provisions in favour of the creditors of an insolvent debtor. But it is provided that they shall not extend to warrants of attorney executed in pursuance of the insolvent act (*l*).

Judgment,
when it may
be signed.

Judgment on, when it may be signed.] If the *cognovit* be made unconditionally, the plaintiff may, of course, sign judgment and sue out execution as soon as he pleases (*m*). But if made upon terms, judgment cannot be signed or execution sued out contrary to such terms, otherwise the court or a judge, upon application, will set it aside (*n*), or a judge will stay the proceedings until the defendant has had an opportunity to apply to the court. Under a *cognovit*, by which it is agreed that no judgment is to be signed or execution issued unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment, unless there be clear words restraining plaintiff from so doing (*o*). Where the *cognovit* is given to secure the payment of a sum by instalments, and default is made, the defendant may, it seems, be charged in execution for each of those defaults as they are made, without any leave of the court or a judge (*p*). Where judgment was not to be entered up until the final hearing of a chancery suit, it was held that the plaintiff was not authorized to enter up judgment pending an appeal (*q*). In one case the defendant gave a *cognovit*, whereby it was stipulated that no judgment should be entered up, unless default should be made in payment of the debt, with interest and costs, on the 9th November; and in case the defendant made default in

(*h*) *Hurst v. Jennings*, 5 B. & C. 650; 8 D. & R. 424, S. C.

(*i*) *Bennett v. Daniel*, 10 B. & C. 500; *Green v. Gray*, 1 Dowl. 350.

(*j*) 3 G. 4, c. 39, s. 8.

(*k*) 1 & 2 V. c. 110, s. 60.

(*l*) 1 W. 4, c. 38, s. 2.

(*m*) *Calvert v. Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, S. C.

(*n*) *Ante*, 675; *Hatton v. Young*, 2 W. Bl. 943; *Perry v. Turner*, 2 Tyr. 121. See as to signing it, where, by the terms

of the *cognovit*, it was not to be so until certain proceedings in Chancery were disposed of, *Jones v. Reynolds*, 1 A. & E. 384; *Dunmer v. Pitcher*, 3 B. & Ad. 347.

(*o*) *Rose v. Tomblinson*, 3 Dowl. 49; *Barrett v. Partington*, 5 Bing. N. C. 487; 7 Dowl. 447, S. C.; and see *Leveridge v. Forty*, 1 M. & Sel. 706, *post*, 698.

(*p*) *Davis v. Gompertz*, 2 Dowl. 407; see *post*, 698.

(*q*) *Jones v. Reynolds*, 3 Nev. & M. 465; 1 A. & E. 384, S. C.

payment, the plaintiff was to be at liberty to enter up judgment and proceed to execution. It was held, that no default could be made until the plaintiff had furnished the defendant with a bill of the costs, and given notice of taxation; and not having done so, that judgment, signed on the 10th November, was irregular, although the defendant had paid no part of either the debt or costs (*r*). But had there been a stipulation for payment by instalments, it seems the plaintiff might have signed judgment, though not issued execution, without taxation (*s*). If before judgment signed the defendant tender the amount of the *cognovit* to the plaintiff, any judgment signed afterwards will be irregular, unless the plaintiff have made a subsequent demand (*t*).

It seems, that parol evidence is inadmissible to shew that a *cognovit* absolute in its terms, was given upon a condition that the defendant should have three months' time (*u*).

Formerly, judgment might have been entered up after the death of the plaintiff or defendant, pending the vacation, as of the preceding term (*x*); and where a *cognovit* was given on the 8th February in Hilary term, with a condition that judgment should not be entered unless default should be made in payment on the ensuing 1st April, and the defendant died in Hilary vacation before the 1st April, judgment entered up on the 10th April in Hilary vacation, after defendant's death, was held regular, as relating to the first day of Hilary term, as also execution tested of a day anterior in that term to the defendant's death (*y*). Now, however, as judgments have not since the rule of *H. T.*, 4 *W.* 4, *r.* 3, (*ante*, 336), relation to the first day of the term, but to the day on which they are actually signed, this cannot be done (*y*).

After Death
of Parties.

Judgment on, how signed.] Where the *cognovit* is given before plea pleaded, and the defendant has not appeared, you must enter a common appearance (*z*) for him, in pursuance of the statute, before you can sign judgment (*a*). If the *cognovit* has been given before declaration, there is no occasion actually to file or deliver any declaration (*b*). If the *cognovit* does not agree on a specific sum for costs of the action, they must be taxed, before you can sign judgment (*c*); and a notice of taxation must,

Judgment,
how signed.

(*r*) *Booth v. Parker*, 3 M. & W. 54; 6 Dowl. 87, S. C.; and see *Wilson v. Northern*, 4 Dowl. 812.

(*s*) *Barrett v. Partington*, 5 Bing. N. C. 487; 7 Dowl. 447, S. C.

(*t*) *Anon.*, 1 Dowl. 173.

(*u*) *Woodman v. Ford*, Q. B., M. 1837; 2 Jurist, 1.

(*x*) *Calvert v. Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, S. C.; *Cowie v. Allaway*, 8 T. R. 257.

(*y*) See *Heath v. Brindley*, 2 A. & E. 365; 4 Nev. & M. 255; *Lanman v. Lord Audley*, 2 M. & W. 535; 5 Dowl. 596, S. C., *nom. Mann*.

(*z*) See Vol. I. 121.

(*a*) The appearance must be entered before judgment signed, or the judgment will be irregular, and the plaintiff cannot enter the appearance afterwards *nunc pro tunc*. (*Watson v. Dore*, 2 M. & W. 386;

5 Dowl. 584, S. C.) In *Davies v. Hughes*, 7 T. R. 206, where a judgment was irregularly signed without filing common bail for the defendant in due time, the defendant was held to be estopped from objecting to the irregularity, having given a *cognovit*, and the plaintiff having, before the objection was made, filed common bail *nunc pro tunc*; but when that case was decided, there was a relation to the first day of the term.

(*b*) *Morley v. Hall*, 2 Dowl. 494; *Rose v. Tomblinson*, 3 Id. 49; *Clarke v. Jones*, Id. 237.

(*c*) *Wilson v. Northern*, 4 Dowl. 212; *Booth v. Parker*, M. & W. 54, *supra*, n. (*r*.) Unless the plaintiff chooses to waive his right to costs, in which case express notice of such intention should be given to the defendant before signing judgment for the debt. (Id.)

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it seems, be given and the costs taxed as in other cases (d). In order to sign the judgment in this case, make an incipitur of the declaration on plain paper, (then called the judgment paper); make an incipitur also on a roll, which you will get at the master's office (e). Take these and the cognovit to one of the masters, and he will sign the judgment, and file the cognovit (f). If the cognovit agrees on a fixed sum for costs, then you sign your judgment and file the cognovit in the same way, except that the master taxes only the usual costs of signing the judgment, and marks them on the judgment paper; and it is not necessary to give notice of taxing those costs (g). If the cognovit have been given after plea pleaded, enter the pleadings, as far as they have gone, upon a roll, which you will get at the master's office. Let the defendant (h), or his attorney, attend with you before one of the masters, for the purpose of withdrawing the plea (i); and the master will accordingly enter the *relicta verificatione* in the margin of the roll, and will sign judgment as above directed (k).

Execution on.

Execution on.] After signing judgment as directed supra, you may, if the judgment be final, proceed to sue out execution according to the terms of the cognovit, producing the judgment paper to the sealer of the writs at the time he seals the fi. fa. or ca. sa. (l). Or, if the judgment be interlocutory only, you may proceed to execute a writ of inquiry, as pointed out post. 681 (m).

The observations already made as to executions in ordinary cases will be, for the most part, applicable to executions on cognovit (*ante*, Vol. I. 395).

We have already pointed out how far the plaintiff is at liberty to avail himself of an execution under a cognovit, in the event of the defendant's becoming bankrupt, or discharged under the Insolvent Act (*ante*, Vol. I. 432, 433).

Cancelling
Cognovit, and
setting aside
Execution,
&c.

Cancelling Cognovit and setting aside Execution, &c.] In some cases the court will order the cognovit to be delivered up to be cancelled, or set aside a judgment and execution thereon: *ex. gr.*—if it were given by an insolvent, before his discharge under the Insolvent Act, for a debt purposely omitted in his schedule (a), or by an infant (p), or were obtained by fraud or duress, or the like (q). Where the plaintiff brought an action on a promissory note for which defendant gave a cog-

(d) R. H., 4 W. 4, r. 17; and see *Clarke v. Jones*, 3 Dowl. 277; *Clothier v. Ess*, 3 Moo. & Sc. 216; *Griffiths v. Liversedge*, 2 Dowl. 143; 3 Moo. & Sc. 217, n. S. C.

(e) See R. M., 5 A. r. 1.

(f) See R. H., 2 & 3 G. 4, Q. B., 5 B. & Ald. 560; 1 D. & R. 471; 2 Chit. Rep. 377; and see 25 Geo. 3, c. 80, s. 29.

(g) *Griffiths v. Liversedge*, 2 Dowl. 143; and see *Clothier v. Ess*, 8 M. & Sc. 316.

(h) R. H., 2 W. 4, r. 100. "Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose before the officer of the court." Before this rule, when the confession was after plea pleaded, the defendant's attorney or his clerk used to come in person before the master to withdraw it, in the Queen's

Bench; (*Anon.*, 1 L. Raym. 845); but this was unnecessary in the C. P. (Tidd, 9th ed. 560).

(i) *Anon.*, 1 L. Raym. 345.

(k) See the form of entry of judgment, &c., Chit. Forms, 320.

(l) R. H., 2 W. 4, r. 75; R. H., 2 & 3 G. 4, *ante*, 451.

(m) See the form of the entry of the judgment, &c., in debt, Chit. Forms, 321; the like in *assumpsit*, Id. 320; the like with a *relicta verificatione*, Id. 320; the like in ejectment, Id.; of the docket paper, Id. 322.

(n) *Tabram v. Freeman*, 2 Dowl. 375; see *Philpot v. Astlett*, 1 C., M. & R. 85.

(p) *Oliver v. Woodruffe*, 6 Dowl. 166; 4 M. & W. 650, S. C.

(q) *Anon.*, 1 Chit. 263; and see *Cowp.* 281.

novit, the court refused to set aside the *cognovit* on the ground that part of the note had been paid, and that it was given for an illegal consideration (*r*). See the cases as to warrants of attorney, *post*, 689, 690.

Also, if the execution be against good faith, or contrary to the terms of the *cognovit*, or the express understanding of the parties, the court, we have seen, (*ante*, 675, 678), will sometimes set it aside. Where the defendant, in an action on the case, gave a *cognovit*, for 200*l.*, with a defeazance conditioned for the performance of various matters by a given time, and performed the matters in part, at least, in two months after the time stipulated, the plaintiff having issued execution on the *cognovit*, the Court of Common Pleas referred it to the prothonotary, to see how much, if anything, ought to be paid to the plaintiff (*s*). If the plaintiff be guilty of any excess in the amount for which he ought to have levied, the court will either set the execution aside (*t*), or, in case of a mistake, refer it to one of the masters; or, if necessary, to a jury, to ascertain for what sum the execution ought to stand (*u*), and an action might, perhaps, be supported against him by the defendant (*x*).

Where it is against good Faith.

Excessive Levy.

Implied Confession of Action.] Besides the case of judgment by default, where the defendant's default is deemed tantamount to a confession, (and which shall be fully considered in Chapter III. *post*, 700), there is also a confession of action in some cases implied in the defendant's pleading; as where an executor or administrator pleads *plene administravit*, or *plene administravit proter*, without pleading in bar, this is impliedly a confession of the action; and upon the plea of *plene administravit* the plaintiff may take judgment of assets *in futuro*; or, upon *plene administravit proter*, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro*, for the residue. (*See further upon this subject, post, Book III. Part II. Ch. 5, Sect. 2*).

Implied Confession of Action.

Writ of Inquiry.] In all these cases of implied confessions, and also of express confessions, which do not ascertain the amount of the damages, the plaintiff must enter up interlocutory judgment only, and then execute a writ of inquiry, except in most actions of debt and in ejectment; in which cases, as the damages recoverable are not of consequence sufficient to warrant the expense of a writ of inquiry, the plaintiff may sign final judgment in the first instance; and except also in a few other cases hereinafter mentioned in Chapter III. *post*, p. 707. After the entry of the interlocutory judgment on the roll, follow the award of the writ of inquiry, the sheriff's return to it, and final judgment. (*See further upon this subject, post, Ch. IV. p. 707*).

Writ of Inquiry.

(*r*) *Bligh v. Brewer*, 3 Dowl. 266.

698.

(*s*) *Charrington v. Laing*, 3 Moo. & P. 587; 6 Bing. 242, S. C.: *Wilson v. Price*, 4 Dowl. 213; and see *Dee Holt v. Roe*, 4 Moo. & P. 177; 6 Bing. 447, S. C.

(*u*) See *per Tindal, C. J.*, in *Shaw v. Marquis of Worcester*, 3 Moo. & P. 587; 6 Bing. 389, S. C.: *Evans v. Pugh*, 2 Dowl. 360.

(*t*) See *Tilby v. Best*, 16 East, 163; *Amery v. Smalbridge*, 2 W. Bl. 700; *post*,

(*x*) *Wentworth v. Bullen*, 9 B. & C. 840.

CHAPTER II.

JUDGMENT UPON A WARRANT OF ATTORNEY.

1. *The Warrant of Attorney.**What, and Form of, &c.*, 682.*How Executed*, 683.*How Attested*, *id.**How far revocable, and how affected by Death, Marriage, &c.*, 687.*When ordered to be given up and Cancelled*, 689.1. *The Warrant of Attorney*—continued.*In what Cases Filed*, 692.2. *The Judgment.**When to be Signed*, 692.*When leave to Sign necessary*, 693.*How Signed, &c.*, 697.3. *Execution, &c.*, 698.BOOK II.
PART IV.

1. The Warrant of Attorney.

What, and Form of.

When given.

By whom.
Consideration for.

By one Partner.

Stamp on.

Defeazance to be written on same Paper or Parchment.

1. *The Warrant of Attorney.*

What, and Form of, &c.] A WARRANT of attorney is a written authority to the attorney or attornies to whom it is directed, to appear for the party executing it, and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default; it also authorizes the attorney to execute a release of errors. It may be given whether an action be depending or not (*a*). It must be given voluntarily and for a good consideration, and by a party capable of appointing an attorney, or it will be voidable, and the court will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. (*See post*, 689 to 692).

It should seem that one partner cannot give a warrant of attorney to bind his copartner without his consent; at all events, he could not do it after the partnership is dissolved (*b*). But a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both (*c*).

It must be on a proper stamp.—The defeazance does not require a separate stamp from that upon the warrant (*d*). But, although the warrant be not stamped at all, or be improperly stamped, and therefore unavailable, yet it may be made available on payment of the usual penalty (5*l.*), and the proper stamp affixed; and this may be done, even after a rule *nisi* obtained to set aside a judgment on the warrant of attorney for the want of or a defect in the stamp (*e*).

By rule of *M.*, 42 *G.* 3, *Q. B.* and *C. P.*, and *R. M.*, 43 *G.* 3, *Exch.*, every attorney who shall prepare any warrant of attorney to confess a judgment, which is to be subject to any defeazance, shall cause such defeazance to be written on the same

(a) See *Baddely v. Shafto*, 8 Taunt. 434; *Reeves v. Slater*, 7 B. & C. 486; 1 M. & Ry. 265, S. C. See the form, Chit. Forms, 323.

(b) See *ante*, 675, as to *cognovits*.

(c) *Brutton v. Burton*, 1 Chit. Rep. 707.

(d) *Cawthorne v. Holben*, 1 N. R. 279.

(e) *Burton v. Kirby*, 7 Taunt. 174; 2 Marsh. 480, S. C.; and see *Rose v. Tomblinson*, 3 Dowl. 49; *Clarke v. Jones* Id. 277; *ante*, 711; *Pittman v. Humphrey*, 2 Tyr. 500.

paper or parchment on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance(f). If the attorney, however, omit to write the defeazance upon the warrant of attorney, as directed by this rule, the omission does not avoid the instrument, but merely renders the attorney answerable, on motion, for the neglect of a duty thus imposed on him by the court(g). Where, however, the warrant of attorney, or a copy of it, is to be filed, pursuant to 3 G. 4, c. 39, and 1 & 2 V. c. 110, s. 60, (see post, 692), if it have been given subject to a defeazance, the defeazance must be written on the same paper or parchment on which the warrant of attorney is written, before the same or the copy thereof is filed, otherwise the warrant will be void(h) as against the assignees of the defendant if he become a bankrupt or insolvent, though not so as between the parties themselves(i); and it would seem that the true defeazance must be written, or the warrant would be void as against such assignees.

The defeazance on the warrant, also, usually contains a stipulation that no *scire facias* shall be necessary to revive a judgment, and such stipulation will be binding on the defendant(k). Also, if the warrant be given for the purpose of securing the payment of an annuity, or of money by instalments, it is also usual to insert a clause in it, dispensing with the necessity of a suggestion of breaches and *scire facias* thereon under 8 & 9 W. 3, c. 11, s. 8(l). It may admit of doubt, perhaps, whether this latter clause can have the effect intended by it(m); besides, from several cases recently decided in the Court of Common Pleas, it seems to be unnecessary; that court having determined that a warrant of attorney is not within the stat. 8 & 9 W. 3, c. 11, s. 8, which requires suggestions of breaches and the *scire facias*(n), even although it be given as a collateral security with a bond(o).

Clause dispensing with *Scire Facias*.

How Executed.] The warrant of attorney is signed, sealed, and delivered; the defeazance only signed. It is not necessary, however, that the warrant should be sealed, unless for the purpose of the release of errors(p). Neither the warrant nor the defeazance need be read over to the party previously to its being executed, as was formerly required by the Court of Common Pleas(q).

How Executed.

How Attested.] Previously to the passing of the act abolishing imprisonment for debt on mesne process, 1 & 2 V. c. 110,

How Attested.

(f) See *Barber v. Barber*, 3 Taunt. 465; *Morell v. Dubost*, Id. 235. See the form, Chit. Forms, 324.

(g) *Shaw v. Evans*, 14 East, 576; *Partridge v. Frazer*, 7 Taunt. 307; 1 Moore, 54, S. C.; and see *Sansom v. Goode*, 2 B. & Ald. 568; 1 Chit. Rep. 311, S. C.; *Barber v. Barber*, 3 Taunt. 465.

(h) 3 G. 4, c. 39, s. 4; 1 & 2 V. c. 110, s. 60.

(i) *Bennett v. Daniel*, 10 B. & C. 500; *Morris v. Mellon*, 6 B. & C. 446; *Aireton v. Avis*, 3 Moo. & Sc. 138; 9 Bing, 740, S. D.

(k) See ante, 675.

(l) See forms, Chit. Forms, 324.

(m) *Kill v. Holister*, 1 Wils. 129; ante, 675.

(n) See post, Ch. 4, Sect. 3; *Shaw v. Marquis of Worcester*, 6 Bing. 385; 4 Moo. & P. 21, S. C.; *Cor v. Rudland*, 3 Taunt. 74; *Kinnersley v. Mussen*, 5 Taunt. 264; and MS., E. 1814, S. P. diet. in B. R.; and see *Tilby v. Best*, 16 East, 163.

(o) *Ansterbury v. Morgan*, 2 Taunt. 195; *Kinnersley v. Mussen*, 5 Taunt. 264; *Bretton v. Burton*, 1 Chit. Rep. 707.

(p) See *Taylor v. Parkinson*, 2 H. Bl. 383.

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PART IV.1 & 2 V. c. 110,
ss. 9 & 10.

an attesting witness was not, in general, requisite (*r*); but the 9th section of that act, after reciting "that it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a *cognovit actionem*, due information of the nature and effect thereof," enacts, "that from and after the time appointed for the commencement of this act," [1st Oct. 1833,] "no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." And the 10th section enacts, "that a warrant of attorney to confess judgment or *cognovit actionem* not executed in manner aforesaid shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same." These provisions, it will be observed, are extremely similar to, though not identical with, those of the general rule of all the courts of *H.*, 2 *W.* 4, *r.* 72, which provided, that "no warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed, which attorney shall subscribe his name, as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney" (*s*).

Differences
between the
Statute and
the Rule.

There is, however, this important difference between the rule and the statute: that the former affected only warrants of attorney and *cognovits* given by persons in custody on mesne process, but the latter affects every such instrument by whomsoever given. There is also another difference, *viz.* that that part of the rule which requires the attesting witness to "declare himself to be attorney for the defendant," was sufficiently complied with by a *caveat* declaration; but the statute requires that the attorney who attests the instrument should "*thereby* declare himself to be attorney for the person executing the same;" so that the declaration should now, in every case, form part of the written attestation. (*See post*, 686).

Consequence
of Non-com-
pliance.

The rule of *H. T.*, 2 *W.* 4, *r.* 72, above mentioned, was always strictly enforced, and, unless it were complied with, the judgment, or other proceedings had under the warrant of attorney or *cognovit*, might be set aside (*b*), although other persons

(r) *Kinnersley v. Mussen*, 5 Taunt. 264. W. Bl. 1097.(s) See *R. E.*, 15 Car. 2, *r.* 2: *R. E.*, 4 G. 2, Q. B.: and *R. H.*, 14 & 15 Car. 2, *r.* 4, C. P.: *Jervis's Rules*, 83, n.: *Tidd*, New Prac. 279: *Ruffle v. Hitchcock*, 2(b) *Fisher v. Nicholas*, 2 C. & M. 251; 4 Tyr. 44; 2 Dowl. 251, S. C.: *Anon.*, 1 Salk. 402, n.: *Ruffle v. Hitchcock*, 2 W. Bl. 1097.

not in custody had also joined in the warrant as collateral securities(c), unless the non-compliance was procured by the contrivance of the defendant purposely to cheat the plaintiff(d). Of course, the statute will be enforced at least as strictly. And cases decided on the construction of the rule are authorities as to the construction of the statute, except where the language is different(e).

The principal requisitions of the rule, and the statute, and the cases decided on them, will now be stated.

1stly. There must be present an attorney of one of the superior courts. He need not be an attorney of the court in which the judgment is signed(f), provided he be an attorney of some other superior court. An attorney's clerk is clearly insufficient(g); so is an attorney who has not taken out his certificate within a year(h). Even where the *cognovit* was executed by a person whom the defendant, without fraud, and in ignorance that he was not an attorney, expressly represented as an attorney, *Coleridge, J.*, held that he was entitled to the protection of the rule, and set aside the *cognovit*(i). Where, however, in a case under the rule, the defendant, on being informed that an attorney must be present on his behalf, knowingly and for the purpose of cheating the plaintiff, produced as an attorney a person whom he knew not to be so, and in his presence executed the warrant, the court refused to set aside proceedings on the warrant on the ground that the person so produced was not an attorney(k). And, in another case under the rule, where an uncertificated attorney, who was also a prisoner, was introduced by the defendant himself as his attorney, and described himself and witnessed the warrant as such, the court refused to interfere(l). Whether the defendant can, even by fraud, divest himself of the protection of the statute, remains to be decided. It seems, however, that he ought not to be allowed to pervert the statute any more than the rule into an instrument of fraud. Another exception to the rule was, where the defendant himself was an attorney, in which case the attendance of another attorney on his part might be dispensed with, as not being within its meaning(m), and the same has been held under the statute(n).

2ndly. The attorney must be present on behalf of the person who executes. It is clear, for instance, that the presence of the plaintiff's attorney will not be sufficient, even though the defendant consent at the time to his acting as his attorney also(o). But several defendants may be attended by the same attorney(p).

3rdly. The attorney must be expressly named by, and attending at the request of, the person who executes. It is necessary that there should be some distinct expression of request or appointment by the person who executes, and that such request or appointment should be the result of a free

Principal Requisites of the Rule and Statute.

1. An Attorney of a superior Court must be present.

Exceptions to this.

2. He must be present on behalf of the executing Party.

3. He must be named by and attending at the Request of the executing Party.

(c) *Valentine v. Gulland*, 2 Taunt. 49. It will in such case be let stand as against the sureties. (Ib.)

(d) *Gilman v. Hill*, Cowp. 141.

(e) See per Lord Abinger, *Oliver v. Woodruffe*, 7 Dowl. 166; and per *Coleridge, J.*, *Barnes v. Pendry*, 7 Dowl. 747.

(f) *Bland v. Pakenham*, 1 Str. 530: *Vilmot v. Bary*, Barnes, 44.

(g) *Barnes v. Ward*, Barnes, 42; *Paul v. Cleaver*, 2 Taunt. 360.

(h) *Verge v. Dodd*, Tidd, Supp. 57.

(i) *Wallace v. Brockley*, 5 Dowl. 695.

(k) *Jeyes v. Booth*, 1 B. & P. 97.

(l) *Cox v. Cannon*, 6 Dowl. 625; 4 Bing. N. C. 453, S. C.

(m) *Walton v. Stanton*, Barnes, 37.

(n) *Chipp v. Harris*, 5 M. & W. 430.

(o) *Mason v. Kiddle*, 5 M. & W. 513:

Hutson v. Hutson, 7 T. R. 7: see *Rice v. Linsted*, 7 Dowl. 153; *Tod v. Gompertz*,

6 Dowl. 296; *Deverell v. Thring*, B. C.,

M. 1839; 3 Jurist, 1193.

(p) See *Haigh v. Frost*, 7 Dowl. 743.

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choice. A mere nomination of an attorney by the plaintiff or his attorney, and adoption of him by the defendant, is not a substantial compliance with the rule (*q*). Therefore, where a defendant offered a warrant of attorney, and the plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney, whom he brought with him, to read over the warrant of attorney to the defendant, and attest it on his behalf, and the defendant acquiesced, but the attorney so introduced was not known to or sent for, or expressly named by him, the warrant was set aside (*r*). And where an attorney who accompanied the clerk of the plaintiff's attorney to the defendant's house (on being told beforehand that there was a *cognovit* to be executed) with the acquiescence of the defendant acted as her attorney in attesting a *cognovit* pursuant to the statute, but the same attorney afterwards carried the *cognovit* to the office to be filed, and there subscribed his name as the plaintiff's attorney's agent, the Court of C. P. set aside the *cognovit*, observing, that it was meant that the defendant should exercise a free and unrestrained choice in sending for some person who shall act as his attorney on the occasion (*s*). And where a defendant about to execute a *cognovit*, having no attorney of his own present, expressed a wish that one might be sent for, and the plaintiff's attorney thereupon sent for and procured one previously unknown to the defendant, who accordingly attended and witnessed the execution, Coleridge, J., set aside the proceedings on the *cognovit*, as the defendant had not had an opportunity of exercising an option in his choice of the attorney (*t*).

It is to be observed, however, that the rule and statute require the attorney to be *expressly* named, but not to be *originally* named by the defendant. The mere circumstance of the attorney having been named in the first instance by the plaintiff's attorney is not material, unless some fraud be shewn (*u*). Therefore, where the defendant being in custody was about to execute a *cognovit*, and the defendant's attorney being absent from home, the plaintiff's attorney suggested another to act for him, to whom the defendant made no objection, but *went to his office*, and, on being asked by that attorney if he wished him to attest the execution as his attorney, answered "*yes*;" this was held to be an express naming of the attorney, so as to satisfy the rule (*x*). And a similar decision has been come to in cases under the statute (*y*).

4thly. The attorney should inform the person about to execute of the nature and effect of the warrant or *cognovit* before the same is executed. It has, however, been held, that if there be no collusion with the plaintiff, a neglect of the attorney's duty in this respect will not vitiate the instrument (*z*). And it is not necessary that it should be read over to the defendant (*y*), except, perhaps, he be a marksman (*a*).

4. He should inform his Client of the Nature and Effect of Warrant.

Lastly. He

Lastly. The attorney should subscribe his name as a wit-

(*q*) *White v. Cameron*, 6 Dowl. 476; *Fisher v. Nicholas*, 2 C. & M. 215; 4 Tyr. 44; 2 Dowl. 251, S. C.

(*r*) *Walker v. Gardner*, 4 B. & Ad. 371. This decision was on the old rule of E. T., 4 G. 2, which is the same as that of H., 2 W. 4, as to warrant of attorney.

(*s*) *Rice v. Linsted*, 7 Dowl. 153.

(*t*) *Barnes v. Pendry*, 7 Dowl. 747.

(*u*) See *per Lord Abinger*, *Oliver v. Woodruffe*, 7 Dowl. 166.

(*x*) *Bligh v. Brewer*, 3 Dowl. 266; 1 C., M. & R. 651, S. C.

(*y*) *Oliver v. Woodruffe*, 7 Dowl. 166; *Taylor v. Nicholl*, Exch., 31st Jan. 1840.

(*z*) *Haigh v. Frost*, 7 Dowl. 743.

(*a*) See *James v. Harris*, 6 Dowl. 184.

ness to the due execution of the instrument, and should *in the attestation* declare himself to be attorney for the person executing the same, *and* state that he subscribes as such attorney. The declaration that the witness is attorney for the person executing, might, under the *rule*, have been made *vivâ voce* (b). And therefore, under the rule, "Witness H. K., attorney for the defendant at his request," H. K. at the same time verbally stating that he attested as attorney for the defendant, was held a sufficient attestation (c). But, as already noticed, in order to satisfy the statute, it must now, in every case, appear *on the face of the instrument* that its requisitions have been complied with, and consequently, the declaration must be in writing (d). "Witness G. E., defendant's attorney named by him and at his request," has been held insufficient for not further stating that G. E. subscribed as such attorney (e). It will, however, it seems, be sufficient to declare that he is attorney for the defendant, and that he subscribes as such, without declaring that he is appointed by him, or the like (d). The safest course is to adhere to the words of the act (f).

should attest and declare himself to be Attorney for the executing Party.

It may be well here to notice what species of custody was within the above *rule* of H., 2 W. 4, r. 72. It was held in one case to apply even to cases where the defendant had reason to suppose himself in custody (g), but this seems doubtful (h). It was not confined to prisoners in the custody of the sheriff or other officer who arrested them, but also extended to prisoners in the custody of the marshal or warden (i). It did not, however, extend to persons in custody in *execution* (k); nor, it seems, to warrants of attorneys given to any other person than the plaintiff at whose suit a prisoner is in custody (l); and, consequently, it did not extend to the case of a person in custody on criminal process (m). But although the rule did not extend to a defendant in custody in execution, yet, if it could be shewn that he was prevailed upon to acknowledge a judgment for more money than was really due, the court, upon application, would relieve him (n). Where a defendant, whilst in custody in Ireland, gave a warrant of attorney to confess a judgment in the Court of Queen's Bench here, the court held that the necessity of an attorney being present on the part of the defendant, at the time of its execution, was as essential as if the defendant were in this country (o). The statute of 1 & 2 V. c. 110, it may be well to repeat, is general in its application, and extends to all warrants of attorney and *cognovits*, no matter by whom, or under what circumstance, they may be given.

What Custody was within the rule of H., 2 W. 4, r. 72.

(b) *Robinson v. Brookbank*, 4 Dowl. 395; *Wallace v. Brockley*, 5 Dowl. 695; *Todd v. Gompertz*, 6 Dowl. 216. *Contra* now under the statute 1 & 2 V. c. 110, s. 9.

(c) *Todd v. Gompertz*, 6 Dowl. 296.

(d) See *Oliver v. Woodruffe*, 7 Dowl. 166.

(e) *Poole v. Hobbs*, 3 Jurist, 1151.

(f) See *per Coleridge, J.*, in *Poole v. Hobbs*, *supra*.

(g) *Turner v. Shaw*, 2 Dowl. 244.

(h) See *Bligh v. Brewer*, 1 C. M. & R. 651; 5 Tyr. 222; 3 Dowl. 266, S. C.

(i) *Parkinson v. Caines*, 3 T. R. 616; and see *Waraker v. Gascoyne*, 2 W. Bl. 1297.

(k) *Birch v. Sharland*, 1 T. R. 715; *Crompton v. Steuard*, 7 T. R. 19; *Fell v. Riley*, Cowp. 281; *Watkins v. Hanbury*,

2 Str. 1245; *Lewis v. Gompertz*, 6 Dowl. 7. It rested on the defendant to shew that he was in custody on mesne process at the time. (Id.) But it was sufficient if it appeared from the affidavits that he must have been in custody on mesne process, without swearing in terms to it. (*Weatherall v. Long*, 6 Dowl. 267).

(l) *Weatherall v. Long*, 6 Dowl. 267; *Holcombe v. Wade*, 3 Burr. 1792; *Finn v. Hutchinson*, 2 L. Raym. 797; *Smith v. Buxton*, 1 East, 241; *Faulkner v. Emmett*, 8 Taunt. 233; 2 Moore, 176, S. C.; *Frances v. Clarkson*, 5 Dowl. 699; *Lewis v. Gompertz*, 6 Id. 7.

(m) *Charlton v. Fletcher*, 4 T. R. 433.

(n) *Fell v. Riley*, 1 Cowp. 281.

(o) *Fitzgerald v. Plunkett*, 2 Str. 1247.

BOOK II.
PART IV.

How far Revocable, &c.

Effect of Death of Parties on.

Effect of other Parties not executing.

How far Revocable. How affected by Death, Marriage, &c.

A warrant of attorney to confess a judgment cannot be expressly revoked; or, if the defendant do that which purports to be a revocation of it, the plaintiff may enter up judgment notwithstanding (*f*). There are some cases of implied revocation, however, which it may be here necessary to mention.

The death of either party is, in general, a revocation of the warrant. Formerly, indeed, this might, in general, have been remedied if the plaintiff were entitled to enter up judgment at the time, by entering up the judgment as of the term in or after which the party died, before the first day of the following term (*g*). Now, however, since the rule of *H. T.*, 4 *W.* 4, *r.* 3, *ante*, 341, orders that the relation of judgments shall only be had to the day on which they are actually signed, this can no longer be done (*h*). If it became necessary to obtain the leave of the court (*i*) to enter up the judgment, even before that rule, they would seldom grant it after the death of the plaintiff, particularly where the application was not made until after the first day of the term following the death (*k*): and in no case would they allow it to be entered up after the death of a sole defendant (*l*). If the warrant, however, in its terms expressly authorizes the judgment to be entered up by the plaintiff's representatives, the court or a judge may, perhaps, even now allow them to enter it up; as, if it be to enter up judgment "at the suit of A., his heirs, executors, or administrators" (*m*). Where the warrant merely empowered the plaintiff to enter up judgment, without mentioning his executors, although the defeazance stated the judgment was to secure the payment of 200*l*. "to plaintiff, his executors," &c., the court refused to allow them to enter up judgment (*n*). If the warrant be given to two or more, and one of them die, the court will allow judgment to be entered up by the survivors (*o*). If a joint warrant be given by two, and one of them die, the plaintiff cannot, unless the terms of the warrant allow it, have leave to enter up the judgment afterwards; not against both, on account of the rule above mentioned; nor against the survivor, for the judgment would not, in that case, pursue the authority (*p*).

And the same reasoning applies where an instrument, purporting to be a joint warrant, is not executed by all the par-

(*f*) *Odes v. Woodward*, 2 L. Raym. 850; 1 Salk. 87, S. C.

(*g*) *Odes v. Woodward*, 1 Salk. 87; 2 L. Raym. 766, S. C.: *Price v. Hughes*, 1 Dowl. 448: *Chancey v. Needham*, 1 Str. 1081: *Fuller v. Jocelyn*, Id. 882: *Savile v. Wiltshire*, Barnes, 270; 1 Saund. 219 e: *Calvert v. Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, S. C.: *ante*, 697.

(*h*) *Heath v. Brindley*, 2 A. & E. 365. There the defendant was dead when the judgment was entered up, and the warrant expressly allowed the judgment to be signed, notwithstanding his death. But the court held the judgment irregular, and set aside the execution, saying that this allowance by the defendant was not binding on his representatives, and still less on the court.

(*i*) It seems a judge at chambers would not interfere. (15 Petersdorff's Ab., Warrant of Attorney, 368).

(*k*) *Cowie v. Allaway*, 8 T. R. 257: *Wild v. Sands*, 2 Str. 718.

(*l*) *Chancey v. Needham*, 2 Str. 1081:

Calvert v. Tomlin, 5 Bing. 1; 2 Moo. & P. 1, S. C.: *vide post*, 693.

(*m*) *Coles v. Haden*, Barnes, 44: see *Baldwin v. Atkin*, 2 Dowl. 591.

(*n*) *Henshall v. Matthew*, 7 Bing. 337; 5 Moo. & P. 157; 1 Dowl. 217, S. C.: *Manville v. Manville*, 1 Dowl. 544, S. P.: *Foster v. Claggett*, 6 Dowl. 524; though the defeazance in that case stated that the executors and administrators might enter up judgment: and see *Short v. Coggin*, 1 Anst. 225.

(*o*) *Fendall v. May*, 2 M. & Sel. 76: *Johnson v. Jenkins*, 30th April, 1832, M.S.; 1 Dowl. 367, S. C.: *Build v. Wightman*, Id. 545: *Fletcher v. Smith*, 2 W. Bl. 1301: *Todd v. Dodd*, 1 Wils. 312; Barnes, 48, S. C.: *Hind v. Kingston*, 6 Dowl. 523.

(*p*) *Gee v. Lane*, 15 East, 592: *Raw v. Alderson*, 7 Taunt. 453; 1 Moore, 145, S. C.: *Gainsborough v. Follyard*, 2 Str. 1121: *post*, 697. The same, even though the release of error be joint and several. (*Wilson v. Portrie*, 1 Jebb. & Symes' Rep. Q. B., (Irish), 96).

ties; in which case, judgment cannot be signed even against those who have executed (*q*). But if the warrant be to enter up judgment "against us or either of us," judgment may be entered up against one only (*r*). And where a warrant was given by two persons, to enter up judgment on a joint bond against *us*, not *us*; the court, after the death of one of them, allowed judgment to be entered up against the other (*s*).

If a *feme sole* give a warrant of attorney, it has been holden that her subsequent marriage, before judgment is entered up, is a revocation of the warrant (*t*). But, from subsequent cases, it appears the court will, notwithstanding the marriage, allow the judgment to be entered up against the husband and wife (*u*). And in *Water v. White & Wife* (*v*), the Court of Queen's Bench, on an affidavit intitled as against both husband and wife, gave the plaintiff leave to enter an appearance for, and enter up judgment against the husband and wife, on a warrant of attorney executed by the wife, whilst unmarried; and the rule was made absolute in the first instance (*y*); though the master suggested a doubt whether it ought not to have been a rule *nisi*. If a warrant of attorney be given to a *feme sole*, her subsequent marriage will not be a revocation of it (*z*); and upon application to the court, founded upon a proper affidavit of the marriage, the execution of the warrant, and the non-payment of the debt (*a*), they will allow the judgment to be entered up in the name of the husband and wife (*b*). And if one *feme sole* give a warrant of attorney to another, and they both marry, the court will allow judgment to be entered up by husband and wife, against husband and wife.

Effect of Marriage of Parties on.

When ordered to be given up and cancelled.] If the warrant of attorney have been obtained by fraud (*c*), or misrepresentation (*d*), or upon an usurious consideration (*e*), or for a gambling debt (*f*), (unless the defendant represented to the plaintiff before he purchased the debt that it was a valid one (*g*),) or to defraud creditors, and the application be made on their behalf (*h*), or by an insolvent debtor previous to his discharge, it being agreed that the debt should be omitted in

When ordered to be given up and cancelled.

Where the Consideration is illegal or fraudulent.

(*q*) *Harris v. Wade*, 1 Chit. 322.

(*r*) *Jordan v. Farr*, 2 A. & E. 437; 4 Nev. & M. 347, S. C.: — *v. Hobson*, 1 Chit. R. 314.

(*s*) *Gladwin v. Scott*, Barnes, 53, C. P.

(*t*) *Anon.*, 1 Salk. 117.

(*u*) *Staples v. Purser*, 2 Dowl. 764; 3 M. & Scott, 800, S. C.: *Anon.*, 1 Show. 89; *Hartford v. Mattingly*, 2 Chit. Rep. 117.

(*v*) *K. B.*, 24th June, 1829.

(*y*) See *Staples v. Purser*, 2 Dowl. 764; 3 M. & Scott, 800, S. C.

(*z*) *Anon.*, 1 Salk. 117.

(*a*) *Marder v. Lee*, 3 Burr. 1469; *Metcalfe v. Boote*, 6 D. & R. 46.

(*b*) *Anon.*, 7 Mod. 53.

(*c*) *Duncan v. Thomas*, 1 Doug. 196; *Fell v. Riley*, 1 Cowp. 281; 3 T. R. 616; *Bayley v. Taylor*, 8 D. & R. 56; *Martin v. Martin*, 3 B. & Ad. 934; *Turner v. Shaw*, 2 Dowl. 244.

(*d*) *Anon.*, 2 Ken. 294.

(*e*) *Berrington v. Collins*, 5 Bing. N. C. 332; *Roberts v. Goff*, 4 B. & Ald. 92; *Cook v. Jones*, 2 Cowp. 727; *Machin v. Delaval*,

Barnes, 52; *Edmonson v. Popplein*, 1 B. & P. 270; *Flight v. Chaplin*, 2 B. & Ad. 112; *Murray v. Harding*, 3 Wils. 390; 2 W. Bl. 859, S. C.: see *Hindle v. O'Brien*, 1 Taunt. 413. In *Connop v. Yeates*, 4 Nev. & M. 302; 2 A. & E. 326, S. C., a warrant of attorney given to secure the amount of an usurious bill at three months, which had been dishonoured at maturity, was holden to be protected by the 3 & 4 W. 4, c. 98, s. 7.

(*f*) See *George v. Stanley*, 4 Taunt. 683; 4 M. & Scott, 615, S. C. A cognovit given in an action on a promissory note was refused to be set aside, on the ground of the note having been given for an illegal consideration (*Bligh v. Brewer*, 3 Dowl. 266).

(*g*) *Davison v. Franklin*, 1 B. & Ad. 142.

(*h*) *Harrod v. Benton*, 2 M. & R. 130; 8 B. & C. 217, S. C.: *Martin v. Martin*, 3 B. & Ad. 934; *Sharpe v. Thomas*, 6 Bing. 416; *Rogers v. Kingston*, 10 Moore, 97; 2 Bing. 441, S. C.: *Dukes v. Saunders*, 1 Dowl. 522.

BOOK 17.
PART IV.

his schedule (*i*), or for a debt discharged by the Insolvent Debtors' Act (*k*), or if given to the plaintiff to induce her to live in a state of prostitution with the defendant (*l*), or expressly and in terms for creating a charge on an ecclesiastical benefice (*m*), or for securing an annuity void by the Annuity Act (*n*), or for securing an attorney payment by his client of costs to which he is disentitled for want of re-admission (*o*), or of future costs (*p*), or the like (*q*), the court or judge will order the warrant to be delivered up to be cancelled; or, if judgment have been entered up, they will set it aside, and any proceedings that may have been had upon it. If the fact of the consideration, however, be doubtful, and be fairly contested, the court will direct an issue to try it, and enlarge the rule for setting aside the judgment in the meantime (*r*), or dismiss it altogether (*s*). Where a party gives a warrant of attorney to another without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed against good faith, the court will not, it seems, interfere (*t*). And the court refused to decide the question, whether a joint-stock company was a nuisance within the 6 *G. 1, c. 18*, upon a motion to set aside a judgment confessed to them on a warrant of attorney (*u*). And where the defendant has had an opportunity of pleading the illegality, the court will not, it seems, interfere summarily (*v*).

Irish Judgment.

It has been doubted whether, in an action upon an Irish judgment entered up on a warrant of attorney, the grounds of such judgment are examinable by the courts here (*x*).

Where the Warrant has been forged or altered.

If it be alleged that the warrant of attorney is forged, or the like, the court will direct an issue to try whether it has been duly executed or not (*y*). But, where a joint warrant of attorney had been altered after its execution, in the christian name of one of the parties, who had re-executed the same without the knowledge of the other, the court refused, on the application of the former, to set aside the judgment which had been signed thereon (*z*).

Where given by an Infant.

Also, if a warrant of attorney be given by an infant, the court will order it to be delivered up to be cancelled, even although there may be circumstances of fraud on the part of

(i) *Tabram v. Freeman*, 2 Dowl. 375: *Jackson v. Davison*, 4 B. & A. 691.

(k) *Smith v. Alexander*, 5 Dowl. 13. But, it seems, the court will not interfere if the defendant has had an opportunity of pleading his discharge. (*Philpot v. Aslett*, 1 C., M. & R. 85; 2 Dowl. 669, S. C.)

(l) *Tidd*, 9th ed. 547.

(m) *Flight v. Salter*, 1 B. & Ad. 673: *Kirlew v. Butts*, 2 B. & Ad. 736, n.: *Britten v. Watt*, 3 B. & Ad. 915: *Colebrooke v. Layton*, 1 Nev. & M. 374: *Aberdeen v. Newland*, 4 Sim. 281: *Alchin v. Ho kins*, 1 Bing. Rep. N. C. 99: *Saltmarsh v. Hewett*, 1 A. & E. 812: *Skrine v. Same*, Id. But the warrant of attorney will not be set aside, unless it does in terms create a charge upon the benefice, contrary to 13 Eliz. c. 20. (See *Moore v. Ramsden*, 3 Nev. & P. 180).

(n) *Ex p. Chester*, 4 T. R. 694: *Steadman v. Purchase*, 6 Id. 737: *Storin v. Tomlins*, 10 Moore, 172: *Nash v. Godmond*, 1 B. & Ad. 634; in which case the de-

fendant had to pay the costs of the judgment and motion, &c.

(o) *Wilton v. Chambers*, 2 Nev. & P. 392; 7 Ad. & El. 524, S. C.

(p) *Jones v. Hunter*, 1 Dowl. 462: *Holdsworth v. Wakeman*, Id. 532.

(q) See *Jackson v. Davison*, 4 B. & Ad. 691.

(r) *Cook v. Jones*, 2 Cowp. 727: *Harrod v. Benton*, 8 B. & C. 217: 2 M. & R. 130, S. C. (s) See *Flight v. Chaplin*, 2 B. & Ad. 112: *Ferguson v. Sprang*, 3 Nev. & M. 665; 1 A. & E. 576, S. C.: *Ex p. Nash*, 4 Moo. & P. 793.

(t) *Ante*, 689, note (h).

(u) *Brown v. Hol*, 4 Taunt. 587: and see other cases in *Tidd*, 9th ed. 547.

(v) *Bligh v. Brewer*, 3 Dowl. 266: *Philpot v. Aslett*, 1 C., M. & R. 85; 2 Dowl. 669, S. C.

(w) *Guinness v. Carroll*, 1 B. & Ad. 459.

(y) *Gibson v. Bond*, Barnes, 239.

(z) *Coke v. Brummell*, 2 Moore, 495; 8 Taunt. 439, S. C.

the infant (*a*), on his clearly shewing that he was under age when he gave the warrant (*b*). But if an infant and another join in a warrant of attorney, and judgment be entered up against both, the judgment may be vacated as to the infant, and remain good as to the other (*c*).

So, if a *feme covert* give a warrant of attorney, the court or a judge will order it to be delivered up to be cancelled, or will set aside the judgment, &c.; the warrant, in such a case, being absolutely void (*d*). And, on motion, the court set aside a judgment on a warrant of attorney given by a *feme covert*, although she had been divorced *a mensâ et thoro* (*e*); and in another case, though the warrant was given by her in an assumed name, and the plaintiff was wholly ignorant of the marriage (*f*). But in a prior case the court refused to relieve her, where, at the time she executed the warrant, she lived by herself, and acted as a *feme sole*, and they put her to her writ of error (*g*). And even a warrant of attorney to confess a judgment to a *feme covert* is void (*h*).

By a married Woman.

Where one of several executors gave a warrant of attorney to confess a judgment against all, the court ordered it to be delivered up to be cancelled (*i*).

By one of several Executors.

It is not an objection to signing judgment on a warrant of attorney that the defendant has, since its execution, become insane (*k*).

By a Lunatic.

Nor, that he has since given another security for the same debt, unless there be some agreement that the latter shall be substituted for the former (*l*).

Where another Security is given.

If the warrant of attorney be not altogether void, but good as to part and bad as to the residue, the court will only destroy the effect of the bad part (*m*). Therefore, a warrant given to secure the payment of future costs, and also costs of money already due and advanced, though void as to the client's future liability, is valid as to the actual debt (*n*).

Where good in Part and bad in Part.

The application to have the warrant given up to be cancelled, or to have judgment or execution on it set aside, may, if the objection be a substantial one,—as, for instance, that it has been given for an illegal or fraudulent consideration,—be made by any person interested in impeaching the warrant, though not a party to it (*o*). And, where it has been given for a fraudulent purpose, it would seem that the application can only be made by third parties, and not by the defendant (*p*). But a mere formal objection, even the want of a formal attestation, under 1 & 2 V. c. 110, s. 9, cannot be made by any but the defendant or his representatives (*q*).

Application, by whom to be made.

(a) *Saunderson v. Marr*, 1 H. Bl. 75: MS., M. 1814: *Storton v. Tomlins*, 10 Moore. 172; 2 Bing. 475, S. C.

(b) *Weaver v. Stokes*, 1 M. & W. 203; 1 T. & G. 512; 4 Dowl. 724, S. C.

(c) *Motteux v. St. Aubin*, 2 W. Bl. 1133: *Wood v. Heath*, 1 Chit. 708, n.: *Ashlin v. Langton*, 4 M. & Scott, 719.

(d) *Ouids v. Sansom*, 3 Taunt. 261.

(e) *Faithorne v. Blaquiere*, 6 M. & Sel. 73.

(f) *Saiby v. White*, 4 Leg. Obs. 390.

(g) *Anon.*, 1 Salk. 400; and see *Wilkins v. Wetherill*, 3 B. & P. 220: *Maclean v. Douglass*, Id. 128.

(h) *Roberts v. Pierson*, 2 Wils. 3.

(i) *Elwell v. Quash*, 1 Str. 20.

(k) *Pigett v. Killick*, 4 Dowl. 287.

(l) *Stowell v. Eade*, 4 Bing. 134: *Anon.*, 2 Chit. 423.

(m) See *Holdsworth v. Wakeman*, 1 Dowl. 532.

(n) *Holdsworth v. Wakeman*, 1 Dowl. 532; and see *Smith v. Alexander*, 5 Dowl. 13; 2 H. & W. 82, S. C.

(o) *Harrod v. Benton*, 2 M. & Ry. 130; 8 B. & C. 217, S. C.: *Martin v. Martin*, 3 B. & Ad. 934.

(p) *Ante*, 689, n. (h); and see *Doe Roberts v. Roberts*, 2 B. & Ald. 367.

(q) *Walker v. Harris*, Exch., 8th June, 1839: see *Jones v. Jones*, 1 D. & R. 558; and *post*, 697.

BOOK II.
PART IV.

The court, in general, give the successful party his costs.

Costs.

In what cases
Filed.

As against
Assignees of
Bankrupt.

In what cases Filed.] By stat. 3 G. 4, c. 39, s. 1, 2, the warrant of attorney, or a true copy thereof, and of the attestation thereof, and of the defeazance and indorsements thereon, and an affidavit of the time of the execution of such warrant of attorney, must be filed with [the masters] within twenty-one days after its execution, to render such warrant of attorney, or any judgment or execution thereon, valid as against the assignees of the defendant, if he should become bankrupt, unless judgment be signed and execution issued within the twenty-one days. The master's fee for the filing is 1s. (r). And if afterwards the debt be satisfied or discharged, a judge, upon being satisfied of that fact, may order a memorandum of satisfaction to be written on the warrant of attorney, or copy filed (s). An affidavit made by an attesting witness to the warrant of attorney, and filed with it, merely stating its date, and that he saw the party execute the same, without verifying the day on which it was executed, has been deemed insufficient under the above act; and the sheriff, who had seized and sold goods under a writ issued at the suit of a judgment-creditor on a judgment entered up on the warrant of attorney, was holden to be liable to the assignees of the party whose goods were seized in an action of trover, a commission of bankrupt having issued against him after the seizure and before sale (t). But in order to let in the objection, that the statute has not been complied with, it must first appear that there is a valid commission against the party, and it seems that it lies upon him who seeks to impeach the warrant of attorney, to shew that it was not filed (u).

Of Insolvent.

The 7 G. 4, c. 57, s. 33, and 1 & 2 V. c. 110, s. 60, extend these provisions in favour of the creditors of an insolvent debtor. It being questionable whether warrants of attorney, executed by insolvent debtors, before adjudication made in the matter of their petition, pursuant to the several acts passed for their relief, were to be deemed secret warrants of attorney within the 3 G. 4, c. 39, it was enacted by the 1 W. 4, c. 38, s. 3, that such warrants of attorney should not be within that act, and that the same should be deemed valid.

2. The Judgment.

3. The Judgment.
When to be
Signed.

When to be Signed.] Judgment may be entered up on a warrant of attorney, at the time therein specified for that purpose; and if the warrant were given to secure the payment of money, it is not necessary that the plaintiff should delay the signing of the judgment until default be made in the payment (x), unless that be expressly stipulated for in the defeazance (y). And if the warrant be given for a sum certain, to indemnify the plaintiff against the payment of a smaller sum, the plaintiff need not defer signing judgment and issuing

(r) 3 G. 4, c. 39, s. 6.

(s) *Id.* s. 8. See also the provisions of the act as to *cognovits*, ante, 677, and the cases there.

(t) *Dillon v. Edwards*, 2 Moo. & P. 550.

(u) *Aireton v. Davis*, 3 M. & Scott, 138;

9 Bing, 740, S. C.

(x) MS., M. 1814: and see *Anon.*, Hardw. 270.

(y) See *Nicholl v. Bromley*, 2 B. & B. 464; 5 Moore, 307, S. C.: *Capper v. Dando*, 1 H. & W. 11; 2 A. & E. 458; 4 Nev. & M. 335, S. C.

execution until the contingency happen (*a*). If the defeazance state that it is given to secure the payment of a sum on demand, and in case default shall be made, then judgment to be entered up and execution issued; an actual demand must be made, and a proposal to settle amicably does not amount to such demand (*b*); and it seems that a demand on a lunatic is insufficient (*c*). A stipulation that judgment shall not be entered up on a warrant of attorney before a certain day, unless the party giving it shall, in the meantime, have become bankrupt or insolvent, does not oust the party to whom it is given from the right to enter up judgment before the day specified, if the former be in insolvent circumstances, although he may not have become bankrupt, or taken the benefit of an Insolvent Debtors' Act (*d*). Where the warrant of attorney was given with a defeazance stating it to be given as a security for a certain sum, and interest thereon, the court held that it was to be construed as a continuing security, and not merely as a security for money then due (*e*). If the warrant specify any particular time at which the judgment is to be signed, it cannot be entered up at any other time (*f*). It may be added, that a warrant of attorney, to confess judgment generally of a term, is regular, notwithstanding *R. G., H. T., 4 W. 4*; and the judgment should be signed of a particular day in that term (*g*). See further the cases as to *cognovits, ante*, 678.

When Leave of the Court or Judge necessary before signing Judgment.] Within a year and day from the date of the warrant, judgment may be entered up as of course (*h*). But after a year and day from such date, judgment cannot be entered up until leave of the court in term time, or of a judge in vacation, is obtained for that purpose (*i*).

By a general rule of all the courts of *H. T., 2 W. 4, r. 1. s. 73*, "*leave to enter up judgment on a warrant of attorney above one, and under ten years old, must be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, upon a rule to shew cause.*" On this rule a *nisi* was holden to be unnecessary for entering judgment on a warrant of attorney under ten years old, notwithstanding it appeared that the defendant was insane, and had been so for a considerable period, and there did not appear to be any chance of his recovery (*j*). In a case decided before this rule, where judgment had not been entered up within a year and day on a warrant of attorney, given with a *post-obit* bond, and no application was made by the obligee to enter it until after the death of the person on whose death it was payable, the court granted a rule *nisi* only (*k*).

(*a*) *Barber v. Barber*, 3 Taunt. 465; and see *Partridge v. Frazer*, 7 Id. 307; 1 Moore, 54, S. C.; *Carr v. Roberts*, 5 B. & Ad. 78; *Skin v. Brook*, 1 Id. 124.

(*b*) *Nicholl v. Bromley*, 5 Moore, 307; 2 B. & B. 464, S. C.; *Abbott v. Greenwood*, Q. B., 2 Jurist, 989; see *Cupper v. Dando*, 4 Nev. & M. 335; 2 A. & E. 458; 1 H. & W. 11, S. C.

(*c*) *Cupper v. Dando, ubi supra*.

(*d*) *Biddlecombe v. Bond*, 5 Nev. & M. 621; 1 H. & W. 612, S. C.; see *Partridge v. Frazer*, 7 Taunt 307; 1 Moore, 54, S. C.

(*e*) *Woolley v. Jennings*, 5 B. & C. 165; 7 D. & R. 824, S. C.; and see *Stoveld v.*

Eade, 12 Moore, 370; 4 Bing. 154, S. C.

(*f*) *Mynn's case*, 1 Mod. 1; *Anon.*, 7 Id. 53.

(*g*) *Todd v. Gompertz*, 6 Dowl. 296.

(*h*) *Calvert v. Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, S. C.

(*i*) *Anon.*, 6 Mod. 212; *Lushington v. Waller*, 1 H. Bl. 94.

(*j*) *Piggott v. Killick*, 4 Dowl. 287; 1 H. & W. 518, S. C. In the report of this case in Dowlings the warrant is stated to have been more than eleven years old; *sed quare*. (See 1 H. & W. 518)

(*k*) *Lushington v. Waller*, 1 H. Bl. 94. See form of the rule, Chit. Forms, 326.

When Leave of Court or Judge necessary before signing Judgment.

Application, how made.

BOOK II.
PART IV.Affidavit in
support of.It must shew
that Defend-
ant is alive.

The application for such leave is founded upon an affidavit, stating the consideration for the warrant of attorney; its execution; the amount remaining due to the plaintiff (l), and alleging positively (m) that the defendant was alive at a certain time therein mentioned (n). The affidavit may or may not, it seems, be intitled in the cause in which the judgment is entered up (o).

It must appear, from the affidavit, in support of the application, that the defendant is alive, either from the deponent's having seen him alive, or otherwise. Formerly, before the *R. H.*, 4 *W.* 4, r. 3, (*ante*, 341), it must have appeared from the affidavit that he was alive upon some day *within the term*, in order that the court might be satisfied that he was alive on the day to which the judgment would have relation; and even where the affidavit stated the defendant to have been alive on the *essoign* day of term, the court held it to be insufficient, saying, that it must appear from the affidavit that the defendant was alive on some day in full term (p). Now, however, as, by that rule, all judgments, whether interlocutory or final, shall be entered of record of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day, the affidavit must be framed without reference to that doctrine of relation. And since that rule it is sufficient in all cases if the affidavit shew that the defendant was alive within a *reasonable* time before the day on which the motion or application is made (q). As to what is a reasonable time, must depend upon the circumstances of each particular case. An affidavit that the defendant was alive on the 8th April, the term commencing on the 15th, was held sufficient (r). And in another case, the court granted a rule moved for on the *third* day of term, upon an affidavit stating that the defendant was alive on a day six days before the commencement of the term (s), and, in another case, a rule was granted where the defendant had last been seen alive above three weeks (t), and in another (u), five weeks before the application. So judgment has been allowed to be entered up against a defendant residing in Jamaica, upon an affidavit that he was alive four months before (v); and against a defendant at Nice, on production and verification of a letter from him, dated thirteen days before (z); and against a defendant in New South Wales, upon an affidavit stating the receipt of a letter from him, dated from that place in the August preceding, the application being made in November (a), and that deponent

(l) *Hulke v. Pickering*, 4 D. & R. 5; 2 B. & C. 555, S. C.; R. H., 2 W. 4, r. 73.

(m) — *v. Hobson*, 1 Chit. Rep. 314; *Jubet v. Harper*, Id. 617 a.

(n) See the form of the affidavit, Chit. Forms, 325.

(o) *Davis v. Stanbury*, 3 Dowl. 440; *Souerby v. Woodruffe*, 1 B. & Ald. 567; 1 Chit. 315. S. C.; *Poole v. Robberds*, Id. 563, n.; *Et p. Gregory*, 8 B. & C. 409.

(p) *Eyles v. Warren*, 4 M. & Sel. 174; 1 Chit. 617, S. C.; *Whittaker v. Whittaker*, 8 B. & C. 768; *Price v. Hughes*, 1 Dowl. 448; *Willes v. James*, Id. 498; *Anon.*, 4 Moore, 2; *Man. Exch. Prac.*, 1st ed. 504.

(q) *Jordan v. Farr*, 4 Nev. & M. 407; 2 A. & E. 437, S. C.

(r) *Robinson v. Lester*, 3 Dowl. 531; and see *Cockman v. Hellier*, 1 Bing. Rep. N. C. 3; 4 M. & Scott, 487; 2 Dowl. 816, S. C.

(s) *Jordan v. Farr*, 4 Nev. & M. 347; 2 A. & E. 437, S. C.

(t) *Watts v. Bury*, 4 Dowl. 44.

(u) *Stockes v. Willes*, 13 Leg. Obs. 29; 5 Dowl. 221, S. C.; and see *Knell v. Joy*, 4 Dowl. 600; 1 H. & W. 670, S. C.

(v) *Roundell v. Powell*, Willes, 66; *Fursey v. Pilkington*, 2 Dowl. 452.

(z) *Grantley v. Summons*, 6 Dowl. 478. (a) *Hopley v. Thornton*, 2 D. & R. 12; and see *Pemberton v. Browning*, 2 Bing. 204; 9 Moore, 389, S. C.; *Johnson v. Fry*, 5 Dowl. 215; *Holkam v. Plunkett*, B. C., 2 Jurist, 494.

then verily believed him to be still alive. So judgment has been allowed to be entered up on an affidavit, shewing that a cheque of the defendant's, dated thirteen days before the application, had been paid in the interim (*b*). An affidavit, stating the receipt of a letter from the defendant, in his handwriting, is sufficient evidence of his being alive at the time it bears date (*c*). But an affidavit, merely stating that deponent saw the defendant, is not enough, unless it state that he saw him *alive* (*d*). And where the affidavit stated merely that the deponent was told by the defendant's wife that her husband was living, the court held it to be insufficient (*e*). It is insufficient, also, for the deponent to swear, that he believes the defendant to be alive from information which he has received, unless he also swears that he believes the information to be true (*f*). If several persons join in the warrant, it must be sworn that they are all alive (*g*), unless the warrant be joint and several, and the application be for the purpose of signing judgment against the survivors only (*h*).

In support of the application, as already observed, there must also be an affidavit by the attesting witness, stating the execution of the warrant of attorney. Even though the attesting witness refuses from malice to make the necessary affidavit, the court will not grant the application (*i*). The circumstance of the commissioner, before whom the affidavit that the party is alive is sworn, being the attesting witness, does not dispense with the necessity of an affidavit by him of the execution of the warrant (*j*). An affidavit that the defendant had recently acknowledged the execution, expressly for the purpose of enabling the plaintiff to enter up judgment without being at the trouble of sending for the subscribing witness, has been held sufficient by the Court of Common Pleas (*k*); though, indeed, the Court of Queen's Bench have decided otherwise (*l*). If the attesting witness be dead or abroad (*m*), and that fact be substantiated by affidavit, or if he cannot be found, and the affidavit state the endeavours which have been made to find him, then the court will receive secondary evidence of the execution (*n*). Where the attesting witness was the clerk of the attorney who prepared the warrant, the want of his affidavit in this case was considered sufficiently supplied by that of his master, verifying the handwriting of his clerk and that of the defendant, and stating that the former had absconded and could not be found (*o*). And a rule was obtained to enter up judgment

Affidavit of attesting witness in general necessary.

(b) *Jacobs v. Griffiths*, 5 Dowl. 577.

(c) *Bidlake v. Carter*, MS., E. T. 1824: *Sanders v. Jones*, 1 Dowl. 367. *Gray v. Withers*, 4 Id. 636; 1 H. & W. 659, S. C.

(d) *Chell v. Oldfield*, 4 Dowl. 629.

(e) MS., M. 1824: — *v. Hobson*, 1 Chit. Rep. 314.

(f) *Reeder v. Whip*, 5 Dowl. 576.

(g) — *v. Hobson*, 1 Chit. Rep. 314.

(h) See *Jordan v. Farr*, 2 A. & E. 437; 4 Nev. & M. 347, S. C.: — *v. Hobson*, 1 Chit. 314; Barnes, 53.

(i) *Mille v. M'Donoughoo*, 1 H. & W. 184. But the attesting witness may be compelled to prove the execution of the warrant; at least, if he be an attorney or

officer of the court. (See *per Williams, J.*, *Doe Avery v. Roe*, 6 Dowl. 518).

(j) *Field v. Bearcroft*, 1 Dowl. 308; 2 C. & J. 217; 2 Tyr. 283, S. C.

(k) *Laing v. Kaine*, 2 B. & P. 85.

(l) *Jones v. Knight*, 1 Chit. Rep. 743: *Holiday v. Lord Orford*, 10 Leg. Obs. 430. See Bagley's Pract. 322.

(m) *Taylor v. Leighton*, 3 M. & Scott, 423; 2 Dowl. 746, S. C.

(n) *Young v. Showler*, 2 Dowl. 556. *Waring v. Bowles*, 4 Taunt. 132; *Jones v. Knight*, 1 Chit. Rep. 743; and see *Appleton v. Bond*, Id. 744.

(o) *Young v. Showler*, 2 Dowl. 556.

BOOK II.
PART IV.

when the attesting witness to the execution of the warrant was dead, and to prove the execution, an affidavit was made by one of the plaintiffs verifying the handwriting of the witness (*p*). The court will, by rule, compel the attesting witness to swear to the execution, at all events, if he be an officer of the court (*q*). The production of an office-copy of the affidavit of the due execution of the warrant at the time it was filed, if it was so, will be sufficient (*r*). If the defendant be a marksman, it seems that the affidavit should state that the warrant was read over to him before execution (*s*). It must be observed, however, that as this is a mere matter of practice, if a judge allows judgment to be signed on other evidence, without the affidavit of the attesting witness, such judgment will not afterwards be liable to be set aside merely on account of that deficiency (*t*).

The original Warrant must be forthcoming.

It may here be added, that even where the warrant of attorney is in the hands of the defendant, the court will not allow the plaintiff to enter up judgment on a copy, though in the defendant's handwriting (*u*). The proper course, in such a case, appears to be to apply for a rule, calling on the defendant to shew cause why he should not produce the original in court for the purpose of having judgment entered on it (*u*).

The Affidavit must shew that a Debt exists.

The consideration, and the sum remaining due, are usually sworn to by the plaintiff himself in the affidavit used on this occasion. And, if not sworn to by the plaintiff himself, it seems that there must be an affidavit stating why not (*x*). Where the plaintiff was a lunatic, an affidavit of the debt being unpaid, made by a person who had received the interest due upon it for the last three years, was deemed sufficient (*y*); and an affidavit by the plaintiff's attorney, swearing to the consideration and the money remaining unpaid, and that he has been employed in managing the money and paying over the interest, has been admitted as sufficient, without any affidavit by the plaintiff himself (*z*). Where the warrant was given to secure the doing of an act, as the re-transfer of stock on demand, the court refused leave to enter up judgment on it on proof of a demand, made while defendant was insane (*a*).

Alien Enemy.

Where it appeared by the plaintiff's affidavit that she was then resident in an enemy's country, the Court of Common Pleas refused to give leave to enter up the judgment (*b*).

Consequences of signing Judgment without leave.

Although judgment happen to be entered up without the leave of the court or a judge when necessary, yet it seems that none but the defendant himself can object to the irregularity (*c*).

(*p*) *Constable v. Wren*, 3 M. & Scott, 210 a: and see *Taylor v. Leighton*, 1d, 423; 2 Dowl. 746.

(*q*) *Clark v. Elwick*, 1 Str. 1: *Coffin v. Idle*, M., 3 G. 4, K. B.: *Tidd*, 9th ed. 554: *Mile v. McDonough*, 1 H. & W. 184: see *Doe Avery v. Roe*, 6 Dowl. 518, per *Williams*, J.

(*r*) *Webb v. Webb*, 4 Dowl. 599.

(*s*) *James v. Harris*, 6 Dowl. 184.

(*t*) *Weller v. Crampton*, at Chambers, 27th September, 1839, *per Maule*, B.

(*u*) *Anon.*, M. 1833, B. C.: *Littledale*, J.,

2 Jurist, 944.

(*x*) *Anon.* M. 1833, B. C.: *Littledale*, J., 2 Jurist, 1067.

(*y*) *Corpendale v. Sunderland*, Barnes, 42.

(*z*) *Ashman v. Bowdler*, 2 C. & M. 212: 4 Tyr. 84, S. C.

(*a*) *Capper v. Dardo*, 2 A. & E. 458; 4 Nev. & M. 335; 1 H. & W. 11, S. C.

(*b*) *De Luneville v. Phillips*, 2 New Rep. 97.

(*c*) *Jones v. Jones*, 1 D. & R. 558: and see *Walker v. Harris*, ante, 691.

[*Judgment, how Signed, &c.*] Enter an appearance for the defendant. *Make an incipitur of the declaration on plain paper, and an incipitur on a roll, which you will get at the master's office. Take these, and the warrant of attorney, to one of the masters, who will sign the judgment, and file the warrant (e). If judgment be signed, and leave of the court or a judge, answer the rule or order to the incipitur, on plain paper, when you take it to the master to sign judgment.* There is no occasion to tax the costs of signing judgment, because they are a fixed sum, which cannot be reduced (*f*). No judgment can be signed upon any warrant authorizing an attorney to confess judgment without such warrant being delivered to and filed by the master, who is to file the same in the order in which they are received (*g*). It is prudent, and indeed usual, to docket the judgment immediately, for the reasons mentioned *ante*, 337, 339, particularly if the warrant of attorney be given to secure the payment of an annuity, or of money by instalments, or the like (*h*).

If a bond have been given with a warrant of attorney, the *declaration* is made out in debt on bond; if not, it is usually made out on a *mutuatus*. But, in all cases, the warrant of attorney must be strictly pursued, in entering up the judgment; therefore, if, on a warrant to enter up judgment in debt on bond, judgment be entered up in debt on a *mutuatus*, the court will set it aside as irregular (*i*). So a general warrant given by a person who afterwards became insolvent, was held not to authorize the plaintiff to enter up a special judgment against his future effects (*k*). Or if a warrant be given to confess a judgment of a particular term or day, judgment cannot be entered up of any other term or day (*l*). So, upon a *joint* warrant of attorney given by two, judgment cannot, in general, be entered up against one, even after the death of the other (*m*). So, a warrant given by one of two executors will not authorize the plaintiff in entering up judgment against both (*n*). Also, where, on a warrant of attorney given to an executor, judgment was entered up in vacation as of the previous term, when the testator himself was alive, the court set it aside for irregularity (*o*). Yet, where a judgment-creditor applied to set aside a judgment and execution against the debtor, upon the ground that the judgment was entered up against the defendant by a different christian name from that signed to the warrant of attorney, the court refused even a rule *nisi* (*p*). But this was, probably, on the ground that a mere formal objection cannot be taken advantage of by third parties (*q*).

The warrant of attorney, as already mentioned, (*ante*, 692), authorizes the attorney to execute a *release of errors*; and if the defendant, notwithstanding, bring a writ of error upon

CHAP. II.

Judgment,
how Signed,
&c.Form of
Judgment
It must per-
sue the War-
rant.

(e) See the form of the entry, Chit. Forms, 326

(f) See *per Patteson, J., Griffiths v. Liversedge*, 2 Dowl. 143.

(g) R. M., 42 G. 3; R. M. 43 Geo. 3. C. P., R. M., 43 G. 3, Exch.; see *ante*, 691.

(h) See the form of the register, Chit. Forms, 334.

(i) *Faris v. Wilkinson*, 8 T. R. 153.

(k) *Burton v. Mardin*, 1 T. R. 60; decided before the 7 G. 4, c. 57.

(l) *Ante*, 678, 692.

(m) *Gee v. Lane*, 15 East, 592; *ante*, 668.

(n) *Elwell v. Quash*, 1 Str. 20.

(o) *Gainsborough v. Fellyard*, 2 Str. 1121; *ante*, 693.

(p) MS., M. 1815.

(q) See *ante*, 631.

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the judgment, or upon a judgment in *scire facias* to revive that judgment (*r*), the court, upon application, would probably quash the writ.

3. Execution, &c.

3 Execution,
&c.

When it may
be issued.

In noticing (*ante*, 692, 693, &c.) the practice as to when the judgment may be signed, we have mentioned several points as to the execution thereon. As soon as judgment is signed, the plaintiff may immediately sue out execution as in ordinary cases, if he be at liberty to do so by the terms of the defeazance. A writ of execution, however, may be sued out before, but it cannot be executed until on or after, the day specified for that purpose in the defeazance (*s*). In some cases, where the warrant of attorney is given to indemnify the plaintiff against the payment of a debt, judgment may be signed, and execution issued, before he has paid it (*t*). If the defeazance state that a demand must be made before execution issued, such demand must be made accordingly (*u*), and upon a person capable of giving a substantial answer (*v*).

For what
Amount, and
when set aside
for excess.

If the plaintiff be guilty of any excess in the amount for which he ought to have levied, the court or a judge will either set aside the execution (*x*), or in case of a mistake refer it to one of the masters, or, if necessary, to a jury, to ascertain for what sum the execution ought to stand; and an action might, perhaps, be supported against the plaintiff (*y*). Where a warrant of attorney was given for securing the payment of an annuity, and upon default made in the payment of the annuity the plaintiff sued out execution and arrested the defendant for the amount of the penalty, the court set aside the execution, and ordered the defendant to be discharged, as the defeazance authorized the plaintiff to take out execution merely for the arrears (*z*). The plaintiff, in such a case, should sue out execution for the amount of the penalty, because the writ of execution must strictly pursue the judgment (*a*), but should indorse it to levy the amount of the arrears only. But where a warrant of attorney was given for the payment of money by instalments, and by the terms of the defeazance the plaintiff was to be at liberty to enter up judgment immediately, "but no execution to be issued until default made in payment of the said sum of 1,402*l*. 18*s*. 8*d*. with interest as aforesaid, by the instalments and in the manner hereinbefore mentioned;" the court held that the plaintiff, upon a fair construction of the above terms of the defeazance, was at liberty to sue out and execute a writ of execution for the entire sum, upon default in payment of any one of the instalments (*b*). In such or similar cases, where the sum secured by the warrant is payable

(*r*) *Baddeley v. Shafto*, 8 Taunt. 484: see *ante*. 68: and see also *Best v. Gompertz*, 2 Dowl. 395.

(*s*) MS., M. 1814: see Hardw. 270.

(*t*) *Barber v. Barber*, 3 Taunt. 465: and see *ante*, 692.

(*u*) *Nicholl v. Bromley*, 5 Moore, 307; 2 B. & B. 464, S. C.: *ante*, 693.

(*v*) *Capper v. Dando*, 1 H. & W. 11; 4 Nev. & M. 335; 2 A. & E. 458, S. C. A demand on a lunatic would not do. (*Id.*)

(*x*) See *Tilby v. Best*, 16 East, 163: *Amery v. Smaulbridge*, 2 W. Bla. 760: see *ante*, 417, 618.

(*y*) *Wentworth v. Bullen*, 9 B. & C. 840.

(*z*) *Tilby v. Best*, 16 East, 163.

(*a*) See *ante*, 400.

(*b*) *Leveridge v. Forty*, 1 M. & Sel. 706: and see *Rose v. Tomblinson*, 3 Dowl. 49. *ante*, 678: *Gowlett v. Hanforth*, 2 W. Bla. 957.

by instalments, and default is made, the defendant may be taken (c) or charged in execution for each of those defaults as they are made, without any leave of the court or a judge (d). Where a warrant of attorney made no mention of interest on the principal, but the defeazance did, the court allowed execution to be issued for the principal and interest (e). Interest at 4 per cent may now in all cases be levied from the date of the judgment under the 1 & 2 V. c. 110, s. 17.

As to how far an execution under a warrant of attorney is or is not available in case of the bankruptcy or insolvency of the defendant, see *ante*, 432, 433, &c.

Although a warrant of attorney be given to secure the payment of an annuity, or of a sum of money by instalments, or the like, it seems a *scire facias* is not necessary, previous to suing out execution for every periodical payment or instalment, as would be the case if a bond only had been given; for it has been decided in several cases in the Court of Common Pleas (f), and it seems also to be the opinion of the Queen's Bench (g), that the stat. 8 & 9 W. 3, c. 11, s. 3, which requires suggestions of breaches and the *scire facias* in such cases (h), does not extend to warrants of attorney to confess judgment on a *mutuatus*, even when given merely as a collateral security with a bond (i).

Also, in other cases, by an express stipulation in the warrant of attorney, a *scire facias* to revive the judgment may be unnecessary, in cases where it would otherwise be required (k).

In Case of
Bankruptcy,
&c.

Suggestions
of Breaches,
and Sci. Fa.
under 8 & 9
W. 3, c. 11,
unnecessary.

Agreement to
dispense with
Sci. Fa.

(c) See *Atkinson v. Baynton*, 1 Hodg. 7; 2 W. Bl. 845.

1 Bing. N. C. 444.

(d) *Davis v. Gompertz*, 2 Dowl. 407.

(e) *Shipton v. Shipton*, 1 Dowl. 518.

(f) *Shaw v. Marquis of Worcester*, 6

Bing. 385; 4 Moo. & P. 21, S. C.; *Auster-*

bury v. Morgan, 2 Taunt. 195; *Cox v.*

Rodburd, 3 Id. 74; *Kinnersley v. Mussen*,

5 Id. 264; and see *Howel v. Hanforth*,

(g) MS., E. 1814: and see *Tilby v.*

Best, 16 East, 163.

(h) See *post*, Ch. 4, Sect. 3, p. 723.

(i) *Austerbury v. Morgan*, 2 Taunt. 195:

see *per Littledale, J.*, in *James v. Thomas*,

5 B. & Ad. 41.

(k) *Ante*, 678.

CHAPTER III.

JUDGMENT BY DEFAULT.

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What, and in
what Cases.

What, and in what Cases.] WHEN a defendant hath a day certain given him in court, and is then demandable, and being demanded doth not appear, the court thereupon give judgment against him by default (*a*).

The defendant allows judgment to go by default, either intentionally, or through mistake or neglect: intentionally, where he has no merits, or when he does so according to a previous agreement with the plaintiff; through mistake, when he puts in a plea, or rejoinder, &c., so informal or defective, that it is treated as a nullity: and through neglect, when perhaps he has merits, but he neglects to plead, rejoin, &c., within the time limited by the rules of court for that purpose. This is also an implied confession of the action.

Nil dicit.

Non sum in-
formatus.

Judgment by default is either by *nil dicit*, that is, where the defendant is stated to have appeared, but to have said nothing in bar or preclusion of the action;—or by *non sum informatus*, where he is said to appear by attorney, but the attorney says that he is not informed by the defendant of any answer to be given. The latter is used only in cases where judgment is entered in pursuance of a previous agreement between the parties; the former, where the defendant has not pleaded within the time limited by the rules of the court, or in a proper manner, or where he has pleaded some plea not adapted to the nature of the action or circumstances of the case, or the like (*b*). As to judgment for want of a plea, and where the plea, from some irregularity in the form of it, or in the manner or time of pleading it, may be treated as a nullity, see *ante*, 165 to 170, &c. As to judgment for want of a rejoinder, rebutter, &c., see *ante*, 197, 198.

Default at
Trial.

If the defendant make default at the trial, this is not such a default as will entitle the plaintiff to sign judgment; but he must proceed regularly to verdict and judgment, in the same manner as if the action were defended.

Default as to
Part o. the
Cause of
Action.

Where judgment by default is signed as to *part*, and issue is joined as to the residue, a special *venire* is always awarded, *tam ad triandum quam ad inquirendum*, as well to try the issue as to inquire of the damages; and the jury who try the issue, in that case, assess the damages for the whole (*c*).

(*a*) *Morice v. Green*, 3 Salk. 213.

(*c*) 11 Co. 5. See the form of the award

(*b*) See forms of judgment by *non sum informatus*, Chit. Forms, 333. of the *venire*, Chit. Forms, 44.

So, where there are several defendants, if some let judgment go by default, and others plead to issue, a similar special *verdict* should be awarded, and the jury who try the issue should assess the damages against all the defendants (*d*). But in actions where the plea of one defendant enures to the benefit of all, as in actions upon contracts (*e*), if the plaintiff fail of obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for the contract being entire, the plaintiff must succeed against all the defendants or none (*f*). In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to go by default (*g*), (unless the plea of those who pleaded prove that the plaintiff could have no cause of action against any of them (*h*)), for the tort is several, as well as joint (*i*).

Judgment by default is *interlocutory* in *assumpsit*, covenant, trespass, case, and replevin, where the sole object of the action is damages; but in debt and ejectment, damages not being the principal object of the action, and those usually recoverable not being of sufficient consequence to warrant the expense of executing a writ of inquiry, the plaintiff usually signs *final* judgment in the first instance. But even in debt the plaintiff must, as we shall hereafter see, in some instances in actions on bonds, execute an inquiry; and sometimes, though not necessary, it may be advisable for him to execute it (*k*).

The Judgment, when interlocutory or final.

When Signed.] Judgment for want of a plea cannot be signed until the defendant is fully before the court. And if it be signed without an appearance entered, it is a nullity, and cannot be cured, even by laches of the defendant (*l*). Therefore, in *bailable* actions, before the passing of the act for abolishing arrest on mesne process, &c. (1 & 2 V. c. 110), if the defendant had not perfected bail, the plaintiff could only proceed against the sheriff, or upon the bail-bond, to compel an appearance by perfecting bail; but in *non-bailable* actions, if the defendant had not entered an appearance within the time limited for that purpose by the rules of the court, the plaintiff might do it for him in pursuance of the statute, and afterwards sign judgment by *nil dicit*, if the defendant had not pleaded within the time allowed him for that purpose (*m*); and as all personal actions must now be commenced by writ of summons (*n*), except in case of proceeding against insolvents under the 85th section of the 1 & 2 V. c. 110 (*o*), the plaintiff may now, it seems, in all cases, enter an appearance for the defendant, and sign judgment as in *non-bailable* actions before the act 1 & 2 V. c. 110. It may be as well here to refer to the preceding volume of this Work,

When Signed.

(*d*) 11 Co. 5: *Dicker v. Adams*, 2 B. & P. 163. See the form of the award of the *verdict*, Chit. Forms, 44.

(*e*) *Porter v. Harris*, 1 Lev. 63: *Bouter v. Ford*, 1 Sid. 76: Ca. Pr. C. B. 107: Pr. Reg. 102: *Hannay v. Smith*, 3 T. R. 662.

(*f*) *Aliter* in some cases, as in another action after plea in abatement for non-joinder, (*ante*, 651), or in action against executors or administrators (*post*). See a form of judgment in such a case, Chit. Forms, 333.

(*g*) *Jones v. Harris*, 2 Str. 1101: *Cressy v. Webb*, Id. 1222.

(*h*) *Biggs v. Benger*, 2 Ld. Raym. 1372: 1 Str. 610, S. C.; 8 Mod. 217.

(*i*) See form of judgment in such a case, Chit. Forms, 333.

(*k*) See *post*, 710.

(*l*) *Roberts v. Spurr*, 3 Dowl. 551.

(*m*) *Ante*, Vol. I. 121.

(*n*) 1 & 2 V. c. 110, s. 2.

(*o*) *Turnor v. Darnell*, 7 Dowl. 346; 5 M. & W. 28, S. C.

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How Signed.

pp. 165, 197, 198, as to when the plaintiff may sign judgment. He cannot, in general, do so for want of a plea before the time for pleading is out. The judgment may be signed in vacation (*p*), but not on a *dies non* (*q*).

How Signed.] After entering an appearance for the defendant, (if none has been already entered (*r*)), then, if your judgment is to be interlocutory merely (*s*), make an incipitur of your declaration on plain paper, and an incipitur on a roll, which you may get at the master's office; take them to one of the masters, and he will sign the judgment (*t*). Having signed interlocutory judgment, you may proceed to sue out and execute your writ of inquiry, or obtain a rule to compute, (as the case may be), as directed in the next Chapter. If your judgment is to be final (*ante*, 701), make an incipitur of your declaration on plain paper, and an incipitur on the roll; take the judgment paper and roll to one of the masters, and he will sign judgment, and tax the costs, and mark them on the judgment paper (*u*). If the defendant has appeared by himself or his attorney, give the usual one day's notice before taxing the costs, as directed post, Book IV. Part I. Ch. 31, title, "Costs." No rule for judgment is necessary in this case. If judgment is to be signed for want of a rejoinder or rebutter, &c., to a replication, or surrejoinder to a plea to the whole cause of action, this being deemed an abandonment of the plea, the plaintiff strikes out all the previous pleadings, and signs judgment as for want of a plea (*x*).

Entry of,
nunc pro
tunc.

By *R. H.*, 4 *W.* 4, *r.* 3, "all judgments, whether interlocutory or final, shall be entered of record of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; provided that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*" (*y*).

Continuances
unnecessary.

Formerly, in the Queen's Bench, after judgment by default, and a writ of inquiry awarded, subsequent continuances, if any, were required to be entered on the roll (*z*), but not so in the Common Pleas (*a*); and now by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 105, "after judgment by default, the entry of any subsequent continuances shall not be required."

Costs.

Costs.] The plaintiff is entitled to his full costs, upon judgment by default, in all cases where he would be entitled to damages if he obtained a verdict, by the *stat. Gloucester* (*b*); and this, although the damages given by the inquest upon the writ of inquiry be less than 40s.; for the statutes upon that subject extend to damages given by a jury only, and not to those given by an inquest. (*See post*, Book IV. Part I. Ch. 31, title, "Costs"). If there be two counts on distinct causes

(*p*) *R. T.*, 29 *Car.* 2, *r.* 5.

(*q*) *Harrison v. Smith*, 9 *B. & Cres.* 243.

(*r*) See *Chit. Forms*. 17. An appearance is so absolutely requisite that an interlocutory judgment signed without it would be a nullity. (*Roberts v. Spurr*, 3 *Dowl.* 551).

(*s*) *Ante*, 701.

(*t*) See the various forms of the entries of judgment by default, *Chit. Forms*, 328 to 333. And see the form of the jury process in these latter cases, where judg-

ment by default is only as to part or by one defendant. (*Chit. Forms*, 69, 70).

(*u*) See the form of the entry of judgment in debt, &c., *Chit. Forms*, 329.

(*x*) *Petre v. Fitzroy*, 5 *T. R.* 152.

(*y*) See this rule noticed *ante*, Vol. I. 341.

(*z*) *Heydon's case*, 11 *Coke*, Rep. 6 b.

(*a*) *Tidd*, 9th ed. 678.

(*b*) *Post*, Book IV. Part. I. Ch. 3.

of action, and the defendant lets judgment go by default as to one, and obtains a verdict on the other, the plaintiff is entitled to costs on the former, and the defendant on the latter (*c*). If there be two defendants, however, one of whom pleads, and the other suffers judgment by default, if the plea pleaded be a complete bar to the action as against both defendants, it seems the plaintiff cannot have his costs against the defendant who suffered judgment by default (*d*). Therefore, where two of the three joint covenantors suffer judgment by default on counts on several deeds, and the third defends and succeeds on some counts, the plaintiff cannot hold his judgment on those counts against the other two; and, in such case, it has been held, that neither party is entitled to his costs on the counts on which the plaintiff fails (*e*). But where, in an action of *assumpsit*, one defendant suffered judgment by default, and the other obtained a verdict, it was held, that he who obtained the verdict was entitled to his costs (*f*). And, in actions *ex delicto*, the plaintiff may retain his judgment against the defendant who suffered judgment by default (*g*), but the defendant who succeeds is entitled to his costs (*h*). (See further, *post*, Book IV. Part I. Ch. 31, title, "Costs.").

Execution.] The execution on a judgment by default is, in general, the same as in ordinary cases (*i*). In the case of bankruptcy, however, sometimes the plaintiff, on a judgment by default, cannot avail himself of it to the prejudice of other creditors (*k*). In actions of debt, within the statute 8 & 9 W. 3, c. 11, s. 8, such as on a bond for the performance of covenants, for the payment of money by instalments, or of an annuity, or the like (*l*), if the defendant suffer judgment to go by default, although in strictness this is a *final* judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but he must *suggest breaches* upon the roll, from time to time, as they occur, and execute a *writ of inquiry*, in order to assess damages on them (*m*).

Execution.

Setting aside or waiving irregular Judgment.] If the judgment itself be *irregularly* signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed when, in fact, the defendant has not been guilty of any default, the court on motion, or a judge on summons, will set it aside, or stay the proceedings, so as to give the defendant an opportunity to move the court for that purpose (*n*). The ap-

Setting aside or waiving Judgment.

(*c*) *Day v. Hanks*, 3 T. R. 654: see *per Caselee*, J., 10 Bing. 560.

(*d*) *Hullock*, 143.

(*e*) *Morgan v. Edwards*, 6 Taunt. 398; 2 Marsh. 201, S. C.

(*f*) *Shrubb v. Barrett*, 2 H. Bl. 28.

(*g*) *Per curiam*, *Morgan v. Edwards*, *ubi supra*.

(*h*) *Price v. Harris*, 10 Bing. 557; 2 Dowl. 804, S. C.

(*i*) See *ante*, 395 to 456.

(*k*) *Ante*, 433.

(*l*) See *post*, Ch. 4, Sect. 3, p. 723.

(*m*) See *Ibid*.

(*n*) It has been doubted whether a judge at Chambers has power to set aside a judgment. (*Rutty v. Arthur*, 2 Dowl. 36: 5 Tyr. 591, S. C.) But the object is sufficiently obtained by an order to stay the proceedings, which affords an opportunity for a subsequent application to the court before execution can be sued out. (11 Petersdorff's Ab. 653: Tidd, 511: Bagley's Prac. 327.) And, in practice, it is every day's occurrence for a judge at Chambers to set aside a judgment.

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PART IV.

plication should be made within a reasonable time, and, at all events, not after the defendant has taken any fresh step after the knowledge of the irregularity (*o*). If the irregularity be in the delivery, filing, or notice of declaration, then an application, if possible, must be made at least two days before inquiry executed (*p*). Or if the writ of inquiry be executed in vacation, and the defendant intend applying to the court, notice of the motion should be given two days previously to the plaintiff's attorney or agent (*q*). And, in general, the time for making the application to set aside an interlocutory judgment for irregularity begins to run from the time that notice was received of judgment being signed, and the defendant cannot as of course delay the application until a rule to compute is served (*r*). It has been lately holden, that an interlocutory judgment cannot be set aside because the notice of declaration is irregular, as the defendant is bound to move to set aside the notice, and not wait until judgment has been signed (*s*). At all events, the application should be made before execution executed; and where the defendant had attended and cross-examined witnesses on executing a writ of inquiry, the court held it too late to move to set aside such judgment (*t*). Taxing costs, and signing final judgment, are considered as contemporaneous acts; and therefore the attendance of the defendant or his attorney before the master on taxing costs, is, in general, an admission that the judgment was properly signed, and it cannot afterwards be objected to as having been signed too soon (*u*). If the judgment be a *nullity*, and not merely irregular, the defendant will not waive it by any delay (*v*); an interlocutory judgment signed without an appearance entered, is a *nullity* (*x*). In setting aside a judgment and execution for irregularity, the rule will, in general, be absolute *with costs*, provided the defendant consents to the terms of bringing no action; but if the defendant will not consent to those terms, the court will not give costs, unless a strong case for damages be shewn (*y*), or the judgment and execution were against good faith (*z*). If the terms of bringing no action be not imposed by the court at the time of disposing of the rule, the defendant cannot afterwards be restrained from bringing an action (*a*). A defendant, on whose application a judgment has been set aside for irregularity in practice, without costs, cannot recover such costs as damages in an action of trespass, for taking his goods under colour of the judgment (*b*).

Plaintiff may
waive the
Judgment.

The plaintiff, also, if he finds that he has signed judgment irregularly, may *waive* the judgment, by getting the master

(*o*) R. H., 2 W. 4, r. 33: *post*, Book IV. Part I. Ch. 17.

(*p*) 1 Scllon, 345: *Minster v. Coles*, 2 Chit. Rep. 237; *Moses v. Richardson*, 8-B. & C. 421; *Scott v. Cogger*, 3 Dowl. 212; *Smith v. Clark*, 2 Id. 218; *Firley v. Rallett*, Id. 708; *Cox v. Tullock*, Id. 478: *vide* *Hill v. Mills*, Id. 696.

(*q*) Tidd, 513, 567: *Gaire v. Goodman*, 2 Smith, 391.

(*r*) *Grant v. Flower*, 5 Dowl. 419.

(*s*) *Smith v. Clarke*, 2 Dowl. 218.

(*t*) *Fraas v. Paravicini*, 4 Taunt. 345; *Gillingham v. Waskett*, M'Clel. 568; *Doe Antrobus v. Jepson*, 3 B. & Adol. 402.

(*u*) Tidd, 9th ed. 930: *Blackburn v.*

Kymer, 5 Taunt. 672; 1 Marsh, 278, S. C.: *Butler v. Bulkeley*, 1 Bing. 233; 8 Moore, 104, S. C.

(*v*) *Roberts v. Smurr*, 3 Dowl. 551.

(*y*) *Lorimer v. Lule*, 1 Chit. Rep. 134, 238; *Wentworth v. Bullen*, 9 B. & C. 840, 849.

(*z*) *Cash v. Wells*, 1 B. & Adol. 375; *Abbott v. Greenwood*, 7 Dowl. 534, *per* *Patteson, J.*

(*a*) *Abbott v. Greenwood*, 7 Dowl. 534.

(*b*) *Luton v. Devereux*, 3 B. & Adol. 343. In the case of a discharge of a defendant from arrest, the judge refused to give him costs, unless he would forego the action. (*Ritchet v. Brevey*, 1 C. & M. 755).

to strike it out; and he may give notice thereof to the defendant's attorney, in order to prevent the expense of an application to the court (c); and he may, it seems, do this, even after application made to set aside the judgment, provided he pay the costs incurred by the defendant in consequence of the irregularity (d). Where the plaintiff gives notice to the defendant of abandoning a judgment by default irregularly signed, but does not actually strike it out, the defendant need not, it seems, apply to the court to set it aside; and, where it appeared that the defendant had not asked the plaintiff to strike out the judgment, *Littledale, J.*, discharged a rule for that purpose, but without costs (e).

Setting aside regular Judgment on Terms.] The court, also, in some cases, on the defendant's application, will set aside a *regular* judgment, upon an affidavit of merits, if the plaintiff has not lost a trial (f). As it is wholly discretionary, however, in the court to do this or not, they will not set aside a regular judgment in order to give the defendant an advantage of any nicety of pleading (g), or of any matter which does not go to the merits of the cause (h): for instance, in an action on an attorney's bill, that no signed bill was delivered (i), or a special plea of questionable matter, designed to draw the plaintiff to demur (k). And the Court of Common Pleas have refused to set aside a regular judgment, where it appeared that the defendant had refused to accede to equitable terms of compromise (l). But a plea of the Statute of Limitations is now considered a plea to the merits; and therefore, in the Common Pleas, an interlocutory judgment was allowed to be set aside without restraining the defendant from pleading it (m). So the defendant may plead bankruptcy (n), or infancy (o).

Setting
aside regular
Judgment on
Terms.

When the court set aside a regular judgment, it is usually upon the terms of the defendant's paying the costs of the application (p), pleading issuably *instantly*, (which means on the same day at all events) (q), taking short notice of trial (r), and giving judgment of the term (s), or of a particular day, when necessary; thereby placing the plaintiff in the same situation as though the judgment had not been set aside (t); and in some cases, also, they will order the defendant to bring the money into court (u); and in all cases of regular judgment will restrain him from bringing an action.

On what
Terms.

The affidavit of merits must, in terms, state that the defendant has "a good defence to this action upon the merits" (x); and must be made, either by the defendant himself or his

"Merits"
must be sworn
to.

(c) *Imp. B. R.* 494, n.

(d) See *post*, Book IV. Part I. Ch. 17: and see *Beeston v. Beckett*, 4 M. & R. 100: *Ca. Prac. C. B.* 124.

(e) *Robinson v. Studdart*, 5 Dowl. 266.

(f) *Wood v. Cleveland*, 2 Salk. 518: *Sisted v. Lee*, 1 Salk. 402.

(g) *Forbes v. Middleton*, 2 Str. 1242.

(h) *Willet v. Atterton*, 1 W. Bla. 35: but see as to Statute of Limitations, *Maddocks v. Holmes*, *infra*.

(i) *Beck v. Mordaunt*, 2 Bing. N. C. 140; 4 Dowl. 112, S. C.

(k) *Wood v. Cleveland*, 2 Salk. 518.

(l) *Anon.*, 4 Taunt. 885.

(m) *Maddocks v. Holmes*, 1 B. & P. 228.

(n) *Evans v. Gill*, 1 B. & P. 52: *Tidd*, 568.

(o) *Delafield v. Tanner*, 5 Taunt. 856; 1 Marsh. 391, S. C.

(p) *Sisted v. Lee*, 1 Salk. 402: see *Prudhoe v. Armstrong*, Barnes, 256.

(q) *Tidd*, 9th ed. 567.

(r) *Matthews v. Stone*, Barnes, 242.

(s) *Fox v. Glass*, 2 Str. 823.

(t) See *Smith v. Blundell*, 1 Chit. Rep. 226: and see *Picker v. Webster*, *Id.* 232.

(u) *Welland v. Rock*, Barnes, 243.

(x) *Ante*, 570. See Chit. Forms, 243.

attorney or agent, or the clerk of the attorney who has the sole management of the cause, or some person who has had such a connexion with the cause as acquaints him with its merits, and this must appear on the face of the affidavit (*y*). An affidavit merely that the defendant is advised and believes he has "a good and meritorious defence" (*z*); or, that the defendant "hath merits and good cause of defence to this action" (*a*); or, that he "is informed and believes that he has a good, substantial, and available defence to this action" (*b*), will not suffice. And an affidavit that he has "merits to defend," or "a good defence to the action," will not satisfy the condition of a rule which requires him to swear to a good defence "on the merits" (*c*). But perhaps an affidavit by the defendant himself, who is not in the profession, that he has a good defence upon the merits, "as he is advised and verily believes," would suffice (*d*); and an affidavit by an agent that from the instructions he had received from the country, he believed that the defendant had a good defence to the action on the merits, has been held sufficient (*e*). The affidavit must state that the defence is to the particular action in question (*f*). The plaintiff cannot in general, in answer to the affidavit of merits, go into a long statement in his affidavit to shew that the defendant has no merits; and if he does, the court will order the master not to allow the costs of that part of the affidavit (*g*).

(*y*) *Rowbotham v. Dupree*, 5 Dowl. 557:
Morris v. Hunt, 1 Chit. Rep. 97.

(*z*) *Bower v. Kemp*, 1 Dowl. 282; 1 C.
& J. 287, S. C.

(*a*) *Lane v. Isaacs*, 3 Dowl. 652.

(*b*) *Page v. South*, 7 Dowl. 412.

(*c*) *Pringle v. Marsack*, 1 D. & R. 155.

(*d*) *Crossby v. Innes*, 5 Dowl. 561.

(*e*) *Schofield v. Huggins*, 3 Dowl. 427.

(*f*) *Tate v. Bodfield*, 3 Dowl. 218.

(*g*) *Heane v. Battersby*, 3 Dowl. 213,
per Gurney, B.

CHAPTER IV.

WRIT OF INQUIRY.

- SECT. 1. *Writ of Inquiry in ordinary Cases*—707 to 721.
 2. *Reference to the Master*—721 to 723.
 3. *Writ of Inquiry, in Debt on Bond*—723 to 729.

SECT. 1.

*Writ of Inquiry in ordinary Cases.**What, and Form of, 707.**In what Cases necessary, 709.**How Sued out and left with the Sheriff, 713.**Before whom to be Executed, id.**Order for a good Jury, 714.**Notice of Executing the Inquiry, id.**Attending by Counsel, 717.**Subpœnaing Witnesses, 717.**How Writ Executed, id.**Evidence and Damages on, id.**Setting aside Inquisition, &c. 719.**Return of Inquisition, 720.**Final Judgment, id.**Execution, id.*CHAP. IV.
SECT. I.

What, and Form of.] A WRIT of inquiry is a judicial writ, directed to the sheriff of the county in which the venue in the action is laid, stating the former proceedings in the action, and "because it is unknown what damages the plaintiff hath sustained," commanding the sheriff that by the oath of twelve honest and lawful men of his county he diligently inquire the same, and return the inquisition into court (*h*). It is now tested on the day on which it is issued, in actions within the Uniformity of Process Act (*i*).

Formerly, the writ must have been *returnable* in term; but now, by stat. 1 W. 4, c. 7, s. 1, reciting, that "the judgment and execution in actions brought in his majesty's courts of law at Westminster are often delayed by reason of the interval between the terms," "for the prevention of such delay," it is enacted, "that any writ of inquiry of damages to be issued in or by either of the said courts, by whatever form of process the action may have been commenced, may be made *returnable* and be *returned on any day certain, in term or vacation*, to be named in such writ, and such writ shall be as valid and effectual as if the same had been returnable according to the course of the common law; and thereupon, at the return thereof, a

(*h*) See the forms of writs of inquiry, Chit. Forms, 335: the like into the county palatine of Lancaster, Id. 336.

(*i*) *Quære*, whether it ought not, in all cases, to be tested in term? (See *Seaton v. Hea*., 5 Dowl. 247).

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PART IV.

rule for judgment may be given (*j*), costs taxed, final judgment signed, and execution issued forthwith (*k*), unless the sheriff or other officer before whom the same may be executed shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court to set aside the execution of such writ, or one of the judges of the said courts shall think fit to order the judgment to be stayed until a day to be named in such order: provided always, that in case the signing of judgment on such writ shall be postponed by reason of such certificate or order, or by the choice of the plaintiff or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record, as of the day of the return of such writ, unless the court shall otherwise direct."

Judgment
and Execu-
tion on,
where Writ
returnable in
Vacation.

By sect. 3, "every judgment to be signed by virtue of this act may be *entered and recorded* as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof; and every execution issued by virtue of this act shall and may bear *teste* on the day of issuing thereof (*k*); and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law."—Sect. 4: "Provided always, that, notwithstanding any judgment signed or recovered, or execution issued, by virtue of this act, it shall be lawful for the court in which the action shall have been brought to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the court may think fit to direct."

In order to enable the plaintiff to avail himself of the advantages of this act, he should make the writ of inquiry *returnable in vacation*, some day immediately after that on which he is certain he will be prepared with his witnesses to execute the same (*l*). After the execution of the writ of inquiry, and judgment and execution thereon under the above act, the court have allowed the defendant to enter a suggestion to deprive the plaintiff of costs, under a Court of Request Act, and ordered the plaintiff to restore the amount of defendant's costs, at the same time restraining the defendant from bringing any action (*m*).

Must include
all the De-
fendants.

The writ must be executed against all the defendants, jointly, who have allowed judgment to go by default. If two defendants, even in trespass, suffer judgment by default, and the plaintiff execute writs of inquiry against them separately,

(*j*) But by the rule of H. T., 2 W. 4, r. 67, *ante*, 332, such rule is unnecessary, and judgment may be signed after the expiration of *four days* from the return of the inquiry without such rule.

(*k*) See also the 3 & 4 W. 4, c. 67, s. 2, which allows the execution to be *returnable immediately after it is executed*, *ante*, 404. As to the return of writs of inquiry in the Common Pleas at Lancaster, see now

the 4 & 5 W. 4, c. 62, ss. 18, 19: 39 & 40 G. 3, c. 105, s. 2: 22 G. 2, c. 46, s. 35: 1 W. 4, c. 7, s. 8: Tidd's Supp. 133.

(*l*) Chit. Sum. Prac. 124.

(*m*) — v. —, MS., Nov. 1832: see *Hale v. Earle*, 2 M. & W. 383: *Bond v. Bailey*, 3 Dowl. 808: 2 C., M. & R. 246, S. C.: *Godson v. Lloyd*, 4 Dowl. 157: *Shaw v. Oates*, Id. 720: *Bernard v. Turner*, 1 M. & W. 580: *Johnson v. Veale*, 7 Dowl. 487.

and take several damages against them, it will be irregular; and if final judgment be entered up for those several damages, it will be error (*n*). The only way the plaintiff has of remedying this evil is, by applying to the court, before final judgment, to set aside his own proceedings; which they will allow him to do, upon payment of costs (*o*).

CHAP. IV.
SECT. I.

As to the amendment of a writ of inquiry, see *post*, Book IV. Part I. Ch. 28. Amendment of.

In what Cases necessary, &c.] When the judgment is interlocutory merely. (which is always the case in *assumpsit*, covenant, case, trespass, and replevin, the sole object of those actions being damages (*p*), the plaintiff's title to damages is thereby established; but the amount of the damages yet remains to be ascertained. This is usually done by a writ of inquiry. As the inquest, however, is merely for the purpose of informing the conscience of the court, the court themselves may, in all cases, if they please, assess the damages, and thereupon give final judgment (*q*); and it is accordingly the practice, in actions upon bills of exchange and promissory notes (*r*), or upon a banker's cheque (*s*), to refer it to one of the masters to compute the amount of principal and interest due on the bill or note, without a writ of inquiry; and the same in an action on an award (*t*), and in an action of covenant for non-payment of a liquidated sum (*u*), as for non-payment of money lent upon mortgage (*v*), or for non-payment of rent upon a lease (*y*), or for the arrears of an annuity (*z*), or the like. But when the computation of damages is not a mere *matter of calculation*, the court will not refer it to one of the masters, but will put the plaintiff to sue out his writ of inquiry; thus, in an action on a bill of exchange for foreign money (*a*), or on a foreign judgment (*b*), or on a bond to save harmless (*c*), or on a covenant to indemnify (*d*), or on a bottomry bond (*e*), or for calls due on railway shares (*f*), and even in an action upon a judgment recovered on a bill of exchange where interest is sought for (*g*), or in *assumpsit* for a sum certain due upon an agreement (*h*), the court have refused to refer it to the master (*i*). In cases where the court will refer it, as when the action is on a bill of exchange or other matter, where the damages are merely the subject of calculation, it is necessary

In what Cases necessary.

(*n*) *Mitchell v. Milbank*, 6 T. R. 199.

(*o*) *Onslow v. Orchard*, 1 Str. 422; *post*, 719.

(*p*) See *ante*, 701.

(*q*) *Bruce v. Rawlins*, 3 Wils. 61; *Thelluson v. Fletcher*, 1 Doug. 316, n.: 1 Esp. 73, S. C.; *Gould v. Hammersley*, 4 Taunt. 148.

(*r*) *Shepherd v. Charter*, 4 T. R. 275; 2 Saund. 107, n. (2). And in *Goldsmid v. Tuite*, 2 B. & P. 55, the court referred it to the prothonotary to compute principal, interest, exchange, re-exchange, and costs; but not charges and expenses. But in *Napier v. Schneider*, (12 East, 419), the court refused to direct the master to allow re-exchange on a bill drawn in Scotland, upon and accepted by the defendant in England.

(*s*) *Roselotti v. Webb*, H. T. 1839, Exch.: *Bentham v. Chesterfield*, 5 Scott, 417.

(*t*) *Meggison v. —*, Tidd, 571.

(*u*) *Thelluson v. Fletcher*, 1 Doug. 316; 1 Esp. 73, S. C.; *Wingfield v. Cleverley*, 13 Price, 53.

(*x*) *Berthen v. Street*, 8 T. R. 326.

(*y*) *Byrom v. Johnson*, 8 T. R. 410; *Campion v. Crawshay*, 6 Taunt. 356; 2 Marsh. 56, S. C.

(*z*) *Allouay v. Hill*, 2 Chit. Rep. 32.

(*a*) *Maunsell v. Massareene*, 4 T. R. 87.

(*b*) *Messin v. Massareene*, 4 T. R. 493; see *Doran v. O'Reilly*, 5 Dowl. 233.

(*c*) *Cooke v. Pettit*, 2 Wils. 5.

(*d*) *Dennison v. Mair*, 14 East, 622.

(*e*) *Tidd*, 571.

(*f*) *Cheitenham Railway Co. v. Fry*, B., C. E. 1839; 3 Jurist, 316.

(*g*) *Nelson v. Sheridan*, 8 T. R. 395; see *Blackmore v. Fleming*, 7 T. R. 446; *Taylor v. Capper*, 14 East, 442; *McClure v. Duncan*, 1 East, 436; but since the 1 & 2 V. c. 110, this would probably be held otherwise, where the plaintiff seeks only £4 per cent.

(*h*) *Tidd*, 571.

(*i*) *Bishop v. Best*, 2 Chit. Rep. 233; 3 B. & Ald. 275, S. C.

BOOK II.
PART IV.In case of
Judgment by
Default as to
Part.

that this appear upon the face of the declaration, and not be mere matter of evidence (*k*); and if one of several counts contain matters of this kind, you can, after a judgment by default, have it referred to the master to compute the damages upon that count, upon your entering a *remittitur damna* as to the others (*l*); but not after payment has been made generally on account (*m*). As to this reference to the master, *vide post*, 722.

But if there be judgment by default as to part, and issue joined as to the residue, or if some of several defendants suffer judgment by default, and others plead to issue, a writ of inquiry is never executed; but a special *venire*, as well to try the issues as to inquire of the damages, is awarded, and the jury who try the issues will assess the damages for the whole (*n*). So, if there be a demurrer to one count, and issue in fact joined on the other, a special *venire* may issue as above mentioned (*o*); or the plaintiff, after he has obtained judgment on the demurrer, may execute an inquiry as to that count, and enter a *nolle prosequi* as to the other (*p*); and he may enter the *nolle prosequi* after the damages have been assessed, provided he do so before final judgment (*q*). Or if there be a demurrer as to part, and judgment by default as to the residue, the plaintiff may sue out a writ of inquiry on the judgment by default, and assess contingent damages as to the demurrer; or he may proceed to obtain judgment on the demurrer in the first instance, and then execute a writ of inquiry on both judgments (*r*).

In Debt, ge-
nerally.

In *debt*, the judgment is always *final*, *quoad* the debt, and the damages usually sought for being very trifling, it is not, in general, worth while to execute a writ of inquiry for them, but the plaintiff may, at once, enter up a final judgment, and sue out execution; and this even in an action on a bail-bond (*s*). So, in debt on a replevin bond, where the not making a return of goods distrained for rent was assigned for breach, it was holden that the plaintiff, after signing judgment by default, might sue out execution for the amount of the goods as indorsed on the replevin bond, and of the taxed costs, without executing a writ of inquiry (*t*). And in one case, in an action of debt (*u*), although the court set aside execution upon a judgment by default, and ordered payment of costs, and referred it to the master, to ascertain what was due to the plaintiff, yet they refused to direct a writ of inquiry to be executed. But if the damages be of sufficient consequence to warrant the expense of proceeding for them, the plaintiff may either execute a writ of inquiry for them, or, where they are mere matter of calculation, may apply to have it referred to one of the masters. Thus, in an action of debt on a judgment of many years' standing, where the defendant allowed judgment to go by default, the court held, that the plaintiff was justified in executing a writ of inquiry, to obtain interest on his judgment by way of damages (*v*). And if, from the

(*k*) *Osborne v. Noad*, 8 T. R. 648.(*l*) *Duperoy v. Johnson*, 7 T. R. 473; *Heald v. Johnson*, 2 Smith, 46, 47, n.; *Hoard v. Hunt*, C. P., M. 1838; 2 Jurist, 24; *Bowden v. Horne*, 7 Bing. 716; 5 Moo. & P. 756, S. C.(*m*) *Jones v. Sheil*, 6 Dowl. 579.(*n*) *Ante*, 700.(*o*) See *Codrington v. Lloyd*, 1 Per. & D. 157.(*p*) *Fleming v. Langton*, 1 Str. 532.(*q*) *Duperoy v. Johnson*, 7 T. R. 473; see *Bowden v. Horne*, 7 Bing. 716; 5 Moo. & P. 756, S. C.(*r*) See *ante*, 662; *Barnes*, 229.(*s*) *Mo dy v. Pheasant*, 2 B. & P. 446.(*t*) *Middleton v. Bryan*, 3 M. & Sel. 155.(*u*) *Taylor v. Copper*, 14 East, 442.(*v*) *Blackmore v. Fleming*, 7 T. R. 426; *McClure v. Duncan*, 1 East, 436; see *Nel-*

nature of the contract, the amount must of necessity be uncertain, then, though the action be in debt, there must be a writ of inquiry to reduce it to a certainty (*x*). Thus, in an action of debt for use and occupation on a *quantum meruit*, after judgment by default, a writ of inquiry would, perhaps, be necessary before signing final judgment (*y*); and in an action on the stat. 2 & 3 Ed. 6, c. 13, for not setting out tithes, there must, it seems, be a writ of inquiry to ascertain the value of the tithes; so, in an action of debt for foreign money, a jury must find the value of the money (*z*). And it seems, that in any case where the plaintiff is uncertain as to the amount of his demand, there is no objection to his signing interlocutory judgment, and executing a writ of inquiry, instead of signing final judgment in the first instance (*a*).

In *debt on bond*, conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, or of an award, or of any other specific act, although judgment by default be entered up for the amount of the penalty, yet a writ of inquiry must afterwards be executed, in order to ascertain what damages the plaintiff may have actually sustained by the breach of covenant, &c., complained of (*b*). This, however, does not extend to bail-bonds, replevin-bonds, bonds of petitioning creditors, or bonds for the payment of a sum of money in gross, or other bonds named *post*, 723.

And, lastly, where the jury, on a trial at *Nisi Prius*, or before the sheriff under the 3 & 4 W. 4, c. 42, or at bar, act as an inquest—as, where they are to assess contingent damages on a demurrer, or where they are to assess damages on a judgment by default, as to some of the counts of the declaration (*c*), or where a demurrer to evidence is put in at the trial (*d*), and the jury omit to assess the contingent damages on the demurrer, or the damages on the judgment by default; or where, in trespass or replevin against an overseer of the poor, the plaintiff is nonsuit, or the defendant has a verdict, and the jury omit to inquire of the treble damages given to the defendant in such a case by stat. 43 Eliz. c. 2, s. 19 (*e*); or where, in *quare impedit*, the jury, after finding for the plaintiff, omit to inquire of the value of the living, &c. (*f*);—in all these cases, the omission of the jury to assess the damages may afterwards, upon application to the court, be supplied by a writ of inquiry; and the same in all other cases where an attaind would not lie (*g*). But whenever an attaind (now abolished by the stat. 6 G. 4, c. 50, s. 60) would have lain, if the jury had assessed the damages,—as in an ordinary personal action, and the jury find a verdict for the

In Debt on Bond, within 8 & 9 W. 3, c. 11.

Where the Jury omit to assess Damages.

son v. Sheridan, 8 T. R. 395: see *ante*, 709.

(*x*) See *per* Bayley, J., *Weald v. Brown*, 2 C. & J. 673.

(*y*) *Arden v. Connell*, 5 B. & Ald. 885.

(*z*) *Arden v. Connell*, 5 B. & Ald. 885; 1 D. & R. 529, S. C.: *Brill v. Neale*, 1 Chit. Rep. 627; 3 B. & Ald. 208, S. C., not S. P.: *Bale v. Hodgetts*, 1 Bing. 182; 7 Moore, 602, S. C.: *McKenzie v. Gayford*, 5 Dowl. 403: *ante*, 709.

(*a*) *McKenzie v. Gayford*, 5 Dowl. 403.

(*b*) 8 & 9 W. 3, c. 11, s. 8.

(*c*) See *ante*, 700, 710: and *Townshend v. Pool*, Barnes, 228.

(*d*) *Darrose v. Newbott*, Cro. Car. 143.

(*e*) *Valentine v. Fawcett*, Hardw. 138; *Valentine v. Fawcett*, 2 Str. 1021; *Herbert v. Waters*, 1 Salk. 205; 1 L. Raym. 59, S. C.: *Duvel v. Marshall*, 2 W. Bl. 921; 3 Wils. 442, S. C.

(*f*) 10 Co. 118: 1 Tidd, 9th ed. 575.

(*g*) See *Einhorn v. Le Maître*, 2 Wils. 367; *Kinaston v. Mayor, &c., of Sirewsbury*, Hard. 295.

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plaintiff, but omit to assess the damages (*h*); or where issue is joined upon a plea in abatement, and the jury, upon finding for the plaintiff, omit to assess the damages (*i*)—the omission cannot be supplied by a writ of inquiry (*k*). Also, in a replevin for a distress for rent, if the jury find for the defendant, but omit to inquire of the arrears of rent, in pursuance of stat. 17 C. 2, c. 7, this omission cannot be remedied by a writ of inquiry; because the statute requires that the inquiry be made by the same jury who try the issue (*l*). And in this last class of cases the proper course is to award a *venire de novo*, as to which, see *post*, Book IV. Part I. Ch. 27, title, “New Trial.” Therefore, where, in an action for a libel, the defendant pleaded the general issue, and nine special pleas, and a verdict was found for the plaintiff on the first issue, and on two of the special pleas, without any damages, and for the defendant on the remaining seven pleas, and the court, upon motion, awarded a writ of inquiry to assess the plaintiff’s damages, on which judgment was entered up for the damages found on the inquisition; a writ of error being afterwards brought in the Exchequer Chamber to reverse the judgment as to the award of the writ of inquiry, that court, holding the verdict on these issues to be void, no damages having been assessed, ordered a *venire de novo* to be awarded to try the first issue, and also the last, so far as related to the two pleas on which the verdict for the plaintiff had been found (*m*).

In case of
Judgment
non obstante
verdicto, &c.

It has been holden, that where a verdict for the plaintiff is void, but the defendant’s plea amounts to a confession, the court will give judgment upon this confession, and award a writ of inquiry to ascertain the plaintiff’s damages (*n*). Where the plaintiff obtains judgment *non obstante verdicto*, he may execute a writ of inquiry, as of course, without applying to the court (*o*).

Award of.

Award of.] Where a writ of inquiry is allowable and necessary, an award of it follows immediately after the entry of the interlocutory judgment, thus:—*But because it is unknown to the court here what damages the plaintiff hath sustained by means of the premises,*” [or where the inquiry is to extend only to some of several counts, they must be particularized, as thus: *by means of the not performing the said promises in the said first and second counts mentioned*] (*p*), “*the sheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently inquire,*” &c. (*q*). If the award of the writ of inquiry on the roll be right, the *teste* of the writ, if wrong, may be amended by it (*r*). Where a writ of error is brought in the House of Lords upon a judgment for the defendant, and the judgment is reversed, a writ of inquiry is awarded by the court in which the original judgment

(*h*) *Clement v. Lewis*, 3 B. & B. 297; 7 Moore, 200, S. C.

Moore, 200, S. C.: see *ante*, Vol. I. 320.

(*i*) *Ante*, 655.

(*k*) See *Etchorn v. Le Maitre*, 2 Wils. 367.

(*l*) *Herbert v. Waters*, 1 Salk. 205: 1 L. Raym. 59, S. C.: see *Freeman v. Archer*, 2 W. Bl. 763.

(*m*) *Lewis v. Clement*, 3 B. & Ald. 702: and see *Clement v. Lewis*, 3 B. & B. 297;

7 Moore, 200, S. C. (*n*) *Lacy v. Reynolds*, Cro. EL. 214: *Jones v. Bodinner*, Carth. 370.

(*o*) *Shephard v. Halls*, 2 Dowl. 339.

(*p*) See *Hughes v. Alvarez*, 2 Str. 684.

(*q*) See the form, Chit. Forms, 328.

(*r*) See *Johnson v. Toulmin*, 4 East, 173: *Pippet v. Hearne*, 1 D. & Ry. 266, 271:

per Bayley, J., 5 B. & Ald. 634, S. C.: *post*, Book IV. Part I. Ch. 28.

remains to ascertain the plaintiff's damages, the House of Lords having no power to award a writ of inquiry (s).

CHAP. IV.
SECT. I.

How Sued out and left with the Sheriff.] Engross the writ on plain parchment; get it sealed by the sealer of the writs. It need not be signed in the Court of Queen's Bench, but it should be so in the Common Pleas or Exchequer; therefore, in either of those courts, get it also signed by one of the masters (t). Indorse on it a memorandum of the day on which it is to be executed; and leave it at the sheriff's office the day before, at latest (u); the sheriff will thereupon summon a jury for the execution of it.

How sued out and left with the Sheriff.

Before whom to be Executed.] The writ is usually executed before the sheriff or his deputy (r). It may, however, under special circumstances, by leave of the court, be executed before the chief justice, if the venue have been laid in Middlesex or London; or by leave of the court or a judge, before a judge of assize as an assistant to the sheriff, if the venue were laid in any other county (y). It is only, however, where some difficult point of law is likely to arise in the course of the inquiry, or where the facts are important, that the court or a judge will grant this indulgence; and the mere importance of the facts will not, it seems, induce the court to grant it, when the venue is laid in Middlesex or London (z); for the under-sheriff of Middlesex, and the secondary in London, are generally men of experience, and fully competent to conduct a business of this kind. By the 3 & 4 W. 4, c. 42, s. 22, the court or a judge may, in a local action, order the inquiry to be executed in another county than that in which the venue is laid, and for that purpose may order a suggestion to be entered on the record, that the inquiry may be more conveniently executed in the other county.

Before whom to be executed.

An application to have a writ of inquiry executed before the chief justice must, it seems, be made to the court in term time. For this purpose, make an affidavit of the circumstances, and give it to counsel with a motion paper, to move for a rule nisi; draw up the rule with one of the masters, and serve a copy of it on the opposite attorney; and afterwards move to make it absolute upon an affidavit of service (a). Draw up the rule with one of the masters, prepare the writ of inquiry as in ordinary cases, annex the rule to it, and leave it at the sheriff's office. You then enter the cause with the marshal, in the same manner as if it were a record, and pay him the same fees (b). The sheriff afterwards returns the inquisition as in other cases.

Motion to have it executed before the Chief Justice.

If the inquiry is to be before a judge of assize, application may be either to the court in term time, or to a judge in vacation: if to the court, it is made in the manner above directed; if to a judge in vacation, get a motion paper signed by counsel, and take it, together with the affidavit above mentioned, to the judge's chambers, and the judge will grant his fiat to one of

Before a Judge of Assize.

(s) *Vicars v. Haydon*, Cowp. 843. See *nell*, 2 Wils. 378.
Chit. Forms, 335.

(t) Tidd, 9th ed. 574.

(u) R. H., 23 G. 3.

(z) See *Wallace v. Humes*, Barnes, 231:
Davis v. Skyllins, Id. 232: *Denny v. Trap-*

(y) See *Anon.*, 12 Mod. 610.

(z) 1 Sellon, 344.

(a) See the forms, Chit. Forms, 337.

(b) See *ante*, 258.

BOOK II.
PART IV.

the masters to draw up the rule(c). Take the motion paper and fiat to one of the masters, and draw up the rule, and proceed as is above directed.

Order for a good Jury.

Order for a good Jury.] When the writ of inquiry is to be executed before the chief justice or a judge of assize, it is not unusual, and in general it is better, to obtain a judge's order(*d*) for the sheriff to return a "*good jury*," which is a better sort of jury taken from the special jury book(*e*). The costs of this good jury are now usually allowed to the plaintiff(*f*).

Notice of executing the Inquiry.

Notice of Executing the Inquiry.] The plaintiff must give a written notice of executing the writ of inquiry to the defendant himself, if he have no attorney in the cause, or otherwise to the defendant's attorney(*g*). But if the attorney be not known, it may be given to the defendant himself. By *R. H.*, 2 *W. 4*, r. 57, "notice of trial and inquiry, and of continuance of inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the court or a judge"(*h*). It must, it seems, be given to all the defendants, if there be more than one(*i*), or left at their last or most usual place of abode(*j*). Notice of inquiry has been allowed to be served by sticking it up in the office, and leaving it at the defendant's last place of abode; though neither the process nor notice of declaration had been personally served(*k*).

To whom given.

How long.

If the writ is to be executed in London or Middlesex, and the defendant lives within forty computed miles of London, eight days' notice must be given, which must be computed exclusive of the day of giving the notice, and inclusive of the day of executing the inquiry(*l*). But fourteen days' notice is required if the defendant resides at a greater distance, the same as a notice of trial(*m*). If the writ is to be executed in any other county, eight days' notice is sufficient(*n*). In *replevin* there should be fifteen days' notice of inquiry under 17 *C. 2*, c. 7, s. 2(*o*). Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, is reckoned as one of the days, unless it be the last day(*p*). And the intervening days between Thursday next before and Wednesday next after Easter-day are reckoned in notices of inquiry, although not in other proceedings(*q*). A defendant residing at an hotel in London, from the time of his arrest

(c) See the forms, Chit. Forms, 337.

(d) *R. H.*, 2 *W. 4*, r. 101. Formerly a rule was necessary, but, by the rule of *H. T.*, "there shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose." (See the form, Chit. Forms, 337).

(e) See *Price v. Williams*, 5 Dowl. 160.

(f) *Wilkinson v. Malin*, 1 Dowl. 630; 1 *C. & M.* 238, *S. C.* Before the rule of *H. T.*, 2 *W. 4*, r. 10, it was otherwise. (See *Calvert v. Gordon*, 3 *M. & Ry.* 124, 128; *Chapman*, 1 *Add.* 26).

(g) *Ante*, 208: *Moseley v. Sanford*, *Barnes*, 311; *Pr. Reg.* 276: *Harding v. Stafford*, *Say*, 133: *Knibbs v. Hopcraft*, 10 *Price*, 147; *Brooks v. Till*, 2 *Y. & J.* 276. See the form, Chit. Forms, 338.

(h) See *Hodges v. Perkins*, 3 *East*, 563; *Barnes*, 306; and see this rule commented on, *ante*, Vol. I. 208.

(i) *Pr. Reg.* 443: *sed vide Figgins v. Ward*, 2 Dowl. 364.

(j) See *R. T.*, 1 *G. 2*; and *ante*, 208.

(k) *Watson v. Delcroix*, 2 Dowl. 396.

(l) *R. M.*, 4 *A. c.*: *R. H.*, 2 *W. 4*, r. 8, *ante*, 93.

(m) *Ante*, 205, 207: see *Stevens v. Pell*, 2 Dowl. 355.

(n) *R. M.*, 4 *A. c.*: *R. H.*, 39 *G. 3*, *Exch.*

(o) *Burton v. Hickey*, 6 *Taunt.* 57; 1 *Marsh*, 444, *S. C.*

(p) *R. M.*, 4 *A. c.*: *R. H.*, 2 *W. 4*, r. 8, *ante*, 93, 207.

(q) *R. E.*, 2 *W. 4*, r. 1, *ante*, 93.

till he was served with notice of inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence was above forty computed miles from London(r). Also, where the defendant resides within forty miles of London before and at the commencement of the action, eight days' notice of executing the writ of inquiry is sufficient, though the defendant has, in the intermediate time, removed permanently to a distance of above forty miles from London, provided he has not given the plaintiff notice of his removal, in which case he would be entitled to fourteen days' notice(s). If he reside above forty miles from London, he will be entitled to fourteen days' notice, although he may be in London when the notice is served(t). Where a defendant is master of a vessel, and resides on board, and has no home on shore, he is considered to reside where his ship is registered; and if more than forty miles from London, is entitled to fourteen days' notice of executing a writ of inquiry(u). And, in general, the same rules that are applicable to notices of trial are equally applicable to notices of inquiry(v). If the defendant be under terms to take "short notice" of inquiry, this is the same as short notice of trial, namely, four days in country causes, and two days in town causes(x). But being under terms to take short notice of trial does not bind the defendant to take short notice of inquiry(y).

A *term's notice* of inquiry is also necessary in cases where a term's notice of trial would be required if the cause had proceeded to trial(z). By *R. II., 2 W. 4, r. 52*, (*ante*, 210), "such notice may be given at any time before the first day of term."

Term's Notice, when necessary.

It is usual to give the notice on a separate piece of paper: but by the rule of *H. T., 2 W. 4, r. 59*, "in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and, in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice will operate from the time that notice of trial was given, as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry, on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., and the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer"(a).

Notice, how given.

(r) *Lloyd v. Hooper*, 7 East, 624.

(s) *Rochford v. Robertson*, 12 East, 427; *Spencer v. Hall*, 1 East, 688; *Brind v. Torris*, 2 W. Bl. 1205.

(t) *Blaaw v. Chaters*, 6 Taunt. 445; 2 Marsh, 151, S. C.

(u) See *Blaaw v. Chaters*, 6 Taunt. 458; 2 Marsh, 151, S. C.; and Vol. I. 205.

(v) MS., H. 1820.

(x) See Vol. I. 205: *Blaaw v. Chaters*, 6 Taunt 458; 2 Marsh, 151, S. C.

(y) *Stevens v. Pell*, 2 Dowl. 355; 2 C. & M. 421, S. C.

(z) *Peyton v. Burdus*, 2 Str. 1100: see *Smith v. Paull*, 3 Smith, 101: and see *ante*, 210. See the form, Chit. Forms, 52.

(a) See *ante*, 197, 661.

BOOK II.
PART IV.Statement of
time of Exe-
cution must
be certain and
definite.But sufficient,
if Defendant
not misled.The Defend-
ant must
attend punc-
tually.Notice for
Sittings or
Assizes.Continuance
or Counter-
mand of
Notice of
Inquiry.

When the writ is to be executed before the sheriff, the notice states that it will be executed on a day therein stated, which must be on or before the return day of the writ (*b*), not being Sunday (*c*), usually between two certain hours (*d*), as between the hours of ten and twelve o'clock in the forenoon, or between the hours of four and six o'clock in the afternoon (*e*), "at the Secondary's Office, No. 28, Coleman Street, London," if in London; or "at the Sheriff's Office, in Red Lion Square, near Holborn, in the county of Middlesex," if in Middlesex; or, if in any other county, then at some place within the county appointed for that purpose, and particularly described in the notice (*f*). A notice of executing the writ "by ten o'clock" (*g*), or "at ten o'clock, or as soon after as the sheriff can attend" (*h*), will be bad for uncertainty; so, "between the hours of ten and two o'clock," has been holden insufficient, as not being sufficiently definite (*i*). But a notice to execute "at 11 o'clock" is good, it having been executed before twelve o'clock (*k*). And when the notice was given for Wednesday, the 11th of June, when Wednesday fell on the 10th, on which day the inquiry was executed, the court refused to set it aside, the defendant refusing to swear that he was misled by it (*l*); and the same, where the notice was given for Tuesday the 14th, whereas the 14th fell on Thursday, on which day the writ was executed (*m*), the defendant not swearing that he was misled.

If the defendant do not attend punctually at the time mentioned in the notice, and the writ be executed in his absence, the court will not relieve him (*n*); and, on the other hand, if the defendant attend at the hour, he will not be warranted in leaving the court at the expiration of the time mentioned in the notice; for the sheriff may have prior business, which may detain him beyond that time (*o*). But, if the plaintiff, in the absence of the defendant, have the writ executed at a different time or place from that specified in the notice, it will be irregular, and the court, upon application, will set it aside.

If the writ is to be executed before the chief justice or judge of assize, the notice is given for the sittings or assizes generally (*p*), in the same manner as in the notice of trial, *ante*, 208.

Notice of inquiry may be *continued or countermanded*, in the same manner as a notice of trial, and as to which, see *ante*, 210, 211 (*q*). It can be continued but once (*r*). The notice of continuance need not specify the place or hour, for it shall be taken to refer to the place and hour specified in the original notice (*s*). But a notice of continuance, not stating the hour

(*b*) *Davies v. Salter*, 2 Salk. 627: *Dyke v. Blackston*, 2 L. Raym. 1449.

(*c*) *Hoyle v. Cornwallis*, 1 Str. 387.

(*d*) *Arnold v. Squire*, Say. 181.

(*e*) *Tidd*, 579.

(*f*) See Comyns, 551: *Squire v. Almond*, Barnes, 297: *Le Mark v. Newnham*, Id. 300: *Arnold v. Squire*, Say. 181: *Pr. Reg.* 447.

(*g*) *Ison v. Fowen*, 2 Str. 1142.

(*h*) *Harnaford v. Holman*, Barnes, 295.

(*i*) *Foster v. Smales*, Barnes, 295, 296: *Robinson v. Phillips*, Id. 296: Comyns, 551: and see 1 Barnard, 139: *Langstaffe v. Lamb*, Barnes, 293.

(*k*) *Last v. Denny*, Barnes, 302.

(*l*) *Eldon v. Haig*, 1 Chit. Rep. 11: and see *Batten v. Harrison*, 3 B. & P. 1: and *ante*, 209, 294: *sed vide Abraham v. Noakes*, 1 Chit. Rep. 5.

(*m*) *Batten v. Harrison*, 3 B. & P. 1.

(*n*) 1 Barnard, 233.

(*o*) *Williams v. Frith*, 1 Doug. 198; *Lofft*, 193, S. C.: 2 Barnard, 214.

(*p*) *Tidd*, 579: 1 Sellon, 353.

(*q*) See form of a notice of continuance, Chit. Forms, 339; of countermand, Id.

(*r*) MS., H. 1820: *Price v. Bambridge*, Barnes, 297: *Burgess v. Royle*, 2 Chit. Rep. 220: *Fryer v. Binns*, B., C. M. 1837; 2 Jurist, 15.

(*s*) *Jones v. Chune*, 1 B. & P. 363.

and place, cannot operate as an *original* notice, though given ten days previously (*t*). Notice of continuance of inquiry must be given in town: but countermand of notice of inquiry may be given either in town or country, unless otherwise ordered by the court or a judge (*u*).

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SECT. 1.

If the plaintiff do not either proceed to execute his writ according to the notice, or countermand it in time, the defendant will be entitled to his *costs of the day*, on an affidavit of attendance and necessary expenses incurred (*v*), in the same manner as for not proceeding to trial (*y*).

Costs of Day,
for not proceeding on
Notice.

An *irregularity* in the notice of inquiry, or in the time and place of executing it, is *waived*, in general, by the defendant or his attorney attending at the inquiry, and making a defence on the execution of the writ (*z*). It has been held, that a defendant to whom an irregular notice of inquiry is given ought to return it forthwith, and state what objection he has to it, otherwise he would not be allowed the costs of an application to set aside the inquiry (*a*). But retaining the notice is no waiver of the irregularity (*b*).

Irregularity
in, how
waived.

[*Attending by Counsel.*] If you wish to attend the execution of the writ of inquiry by counsel, you should give notice thereof to the opposite party (*c*), in order to get the expense of his attendance, and briefs, &c., allowed you. Moreover the sheriff may, it seems, at the request of the opposite party, postpone the execution of the writ, unless such notice be given (*d*). A written notice is not requisite (*e*). The master may or may not, in his discretion, allow costs for the attendance of counsel, and preparing briefs, &c. (*f*).

Attending by
Counsel.

[*Subpoenaing Witnesses.*] After the notice of inquiry, the next step to be taken is to subpoena the witnesses necessary to prove the amount of the damages (*g*).

Subpoenaing
Witnesses.

[*How Writ executed.*] Immediately upon the receipt of the writ, the sheriff will summon a jury. Attend at the time appointed, with your counsel and witnesses; and the inquiry will be taken in nearly the same manner as at a trial at Nisi Prius, (see *ante*, 264), excepting that the jurors cannot be challenged (*h*). Also, the execution of the writ may be *adjourned* by the sheriff, if necessary, after it is entered upon (*i*).

How Writ
executed.

[*Evidence and Damages.*] All the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages (*k*); for the cause of action itself, as stated in the

Evidence and
Damages.

(*t*) *Fryer v. Binns*, B., C. M. 1837; 2 Jurist, Id.

(*u*) R. G. H., 2 W. 4, s. 57.

(*z*) R. H., 8 G. 1 a: see *Sutton v. Bryam*, 2 Str. 728.

(*y*) See *post*, Book IV. Part I. Ch. 23.

(*z*) See *ante*, 211.

(*a*) *Stevens v. Pell*, 2 Dowl. 355.

(*b*) Id.

(*c*) See the form, Chit. Forms, 380.

(*d*) See *Elliott v. Micklin*, 5 Price, 641;

1 Sel. 544: *Coleman v. Mauby*, 2 Str. 853; *Markham v. Middleton*, Id. 1259.

(*e*) *Elliott v. Micklin*, 5 Price, 641.

(*f*) *Hullock v. Hemsworth*, Tidd, 9th ed. 580.

(*g*) See *ante*, 232. See form of a *pro-cipe* for a subpoena, Chit. Forms, 339; of the subpoena, Id.; of the subpoena ticket, Id. 340.

(*h*) *Anon.*, 3 Salk. 81.

(*i*) *Coleman v. Mauby*, 2 Str. 853; *Markham v. Middleton*, Id. 1259; *Elliott v. Micklin*, 5 Price, 641.

(*k*) *De Guillon v. L'Aigle*, 1 B. & P. 368.

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declaration, is impliedly admitted by the defendant, by his suffering judgment to pass against him by default (*l*). The judgment admits something to be due, but disputes the amount: therefore, in an action for work and labour under the common counts, though the defendant admits that some work was done at his request, still he may cross-examine plaintiff's witnesses, or perhaps call others to prove that all the work charged for was not done at defendant's request (*m*). In an action on a policy on a foreign ship, when there is a stipulation that the policy shall be sufficient proof of interest, and judgment is suffered by default, the plaintiff, on the inquiry, need only prove the defendant's subscription to the policy, without giving any evidence as to interest (*n*). A lease, mentioned in the condition of a bond set out by the defendant upon *oyer*, need not be proved (*o*). So, a bill of exchange or promissory note, if declared upon, need not be proved, although it must be produced, in order to satisfy the inquest that no money has been paid on account of it (*p*): and the plaintiff is entitled to recover nominal damages, though the bill or note be not produced (*q*). So a contract, if declared on, is by the judgment admitted, and evidence to contradict it, which would be good under the general issue, ought not to be admitted (*r*). So the defendant, in an action on a contract, will not be allowed to give evidence of fraud (*s*), or of any other matter which would render the contract void; for, by allowing judgment to go by default, he has admitted the validity of the contract. So, the defendant will not be allowed to give in evidence, in mitigation of damages, any matter which might have been made the subject of a set-off (*t*). In an action for use and occupation, the plaintiff need not shew that the house occupied by the defendant was the plaintiff's house, as the judgment by default is an admission that the defendant occupied a house under the plaintiff; but if the defendant insist that he did not occupy the particular house alluded to in the evidence produced on the inquiry, the plaintiff must then prove the fact of its being his own house (*u*).

Amount of
Damages,
where no Evi-
dence given.

In trespass, or any other action, where the damage actually sustained by the plaintiff is the measure of the damages to be given by the jury, if the plaintiff do not prove the nature of the injury, and the amount of the damage sustained by him, the jury always give nominal damages merely. But where the jury are to imply the amount of the damages from the nature of the injury, and where no special damage could be proved unless laid in the declaration,—as, for instance, in an action of slander, or the like,—there, although the plaintiff do

(*l*) *Eadem v. Lutman*, 1 Str. 612: and see 2 Saund. 107, n. 2.

(*m*) *Williams v. Cooper*, 3 Dowl. 204.

(*n*) *Thelluson v. Fletcher*, 1 Doug. 316; 1 Esp. 73, S. C.

(*o*) *Collins v. Rybot*, 1 Esp. 157.

(*p*) *Green v. Hearne*, 3 T. R. 301: *Anon.*, 3 Wils. 155: and see *Bevis v. Lindsell*, 2 Str. 1149. On an application for a rule to compute without production of the bill, the court refused to give an opinion whether production was necessary, but granted the rule, leaving the question to

the decision of the master. (*Sanderson v. Lee*, 7 Dowl. 97).

(*q*) *Marshall v. Griffin*, 1 R. & M. 41.

(*r*) *Stephens v. Fell*, 2 Dowl. 629: see *De Gaillon v. L'Aigle*, 1 B. & P. 368: *Shepherd v. Chester*, 4 T. R. 275.

(*s*) *Eadem v. Lutman*, 1 Str. 612: *Shepherd v. Chester*, 4 T. R. 275.

(*t*) *Carruthers v. Graham*, 14 East, 78. As to payments, see *ante*, Vol. I. 185, 186.

(*u*) *Davis v. Holdship*, 1 Chit. Rep. 644, n. (a).

not offer evidence, yet the jury may give such damages as the circumstances of the case warrant (*x*).

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In an action for mesne profits, the jury may give as damages, not merely the annual value of the premises, but may give even four times its amount, and damages for plaintiff's trouble, &c. (*y*).

In Action for
mesne Profits.

The jury may give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in an action of trover or trespass *de bonis asportatis*; and over and above the money recoverable in an action on a policy of insurance made after the 14th of August, 1833 (*z*): and they ought to assess interest in the same cases in which it may be given by a jury at *Nisi Prius* (*a*).

Interest as
Damages.

If there be two or more defendants who suffer judgment to go by default, the inquest cannot, even in trespass, sever the damages (*b*); but where there is judgment by default against one defendant, and judgment upon demurrer against the other, the inquest may sever the damages, because the defendants have severed in their pleading (*c*).

Where the
Damages may
be severed.

[*Inquisition, how set aside, &c.*] Within four days after the return day of the writ of inquiry, the defendant may, if he chooses, move the court to set aside the inquisition, or arrest the judgment, or apply to a judge (*d*) to stay the judgment until a day named by him. The sheriff or other officer before whom the writ was executed may also prevent the signing of judgment immediately, if he certify, on the return of the writ (*e*), that judgment ought not to be signed till defendant shall have had an opportunity of applying to the court to get the execution of the writ set aside (*f*). To procure such certificate of the sheriff or order of a judge, it is usual to make an affidavit of the facts to induce him to grant it, though this seems unnecessary (*g*). Upon moving for such new trial, &c., it will suffice to produce the under-sheriff's notes verified by affidavit (*h*).

Inquisition,
how set aside,
&c.

As to the causes for which the court will set aside the inquisition, see *post*, Book IV. Part I. Ch. 27, title, "*New Trial*." A motion to set aside an inquiry for excess in the damages will not be granted, unless a strong case be made out, and it seems that it will not be granted on the affidavits of the parties, unless corroborated by others (*i*).

For what
Causes.

Where the court, upon application, ordered a new inquiry, on the ground that as to part of the damages found there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand; it was held, notwithstanding, that he was not bound to pay the plaintiff the costs of the first inquiry (*k*).

Costs of first
Inquiry.

(*x*) *Tripp v. Thomas*, 3 B. & C. 427; 5 D. & R. 276, S. C.

quare. See Vol. I. 323.

(*y*) *Goodtitle v. Tombs*, 3 Wils. 191.

(*d*) See a form of the summons and order, Chit. Forms, 341.

(*z*) 3 & 4 W. 4, c. 42, s. 29.

(*e*) See a form of certificate, Chit. Forms, 341.

(*a*) ——— v. *Edmunds*, 6 Taunt. 346. See 3 & 4 W. 4, c. 42, s. 38: and see *ante*, "Verdict," p. 322.

(*f*) 1 W. 4, c. 7, s. 1, *ante*, 707.

(*b*) *Onslow v. Orchard*, 1 Str. 422: *ante*, 700, 701, 323.

(*g*) See a form, Chit. Sum. Prac. 358.

(*h*) *Stephens v. Pell*, 2 Dowl. 629.

(*i*) *Lothbury v. Brown*, 10 Moore, 106.

(*c*) *Chapman v. House*, 2 Str. 1140; *sed*

(*k*) *Porter v. Cooper*, 3 Dowl. 662.

BOOK II.
PART IV.
Return of.

Return of.] Call at the sheriff's office, at or after the expiration of four days from the return day of the inquiry, and he will deliver to you the writ and his return with the inquisition. Such return is indorsed on the writ of inquiry. The inquisition is engrossed on parchment, and signed and sealed in the name of the sheriff and by the jurors (l). The defendant is entitled to have the inquisition filed; and if the plaintiff's attorney refuses to file it or shew it to the defendant's attorney, the court will compel him to do so, and to pay the costs (m).

Final Judgment, &c.

Final Judgment, &c.] After the four days from the return day of the inquiry has expired, (if the sheriff has not certified on the writ as above mentioned, and a judge has not ordered the staying the judgment till a day not yet arrived, and the defendant has not moved to set aside the inquisition or in arrest of judgment, or if he has moved, and the inquisition be not set aside, nor the judgment arrested), get your costs taxed by one of the masters and final judgment signed, as upon a postea, (see post, Book IV. Part I. Ch. 31, title, "Costs"), and you may then proceed forthwith to sue out execution. (See ante, 707). By rule of H. T., 2 W. 4, r. 67, "after the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return without any rule for judgment." It seems, however, that where the damages assessed by the inquiry are under 20*l.*, it is the practice to consider the same as within the 3 & 4 W. 4, c. 42, s. 18, post, 727, and to tax costs and sign judgment immediately after the execution of the inquiry, without waiting the four days (n).

Entry of on Roll.

The entry of the judgment is thus :—After the award of the writ of inquiry on the roll, (as ante, 712), follows an entry of the return of it and the finding of the inquest, and lastly the entry of the final judgment as in ordinary cases (o). We have seen (ante, 702) that the judgment is to be entered of record of the day when signed, to which day it has relation; also, that there is no occasion to enter any continuances. If the roll have already been carried in, this entry will be made by one of the masters, upon your leaving the inquisition with him for that purpose. But if the roll have not as yet been carried in, you must get a roll, and enter the proceedings on it, to the interlocutory judgment inclusive; after which, enter the award of the inquiry, the return, and final judgment, as above mentioned. Then docket your entry and carry in the roll (p).

After Death of Defendant.

If the defendant die after interlocutory and before final judgment, and the interlocutory judgment be revived against the executor, &c., and a writ of inquiry executed, the final judgment in that case must be against the executor or administrator, and not against the testator or intestate (q).

Execution.

Execution.] The execution after a writ of inquiry is the same as in ordinary cases. By the 3 & 4 W. 4, c. 42, s. 19, all the provisions of the 1 W. 4, c. 7, relating to judgments and executions, are extended to judgments and executions on writs of inquiry.

(l) See a form of the sheriff's return and inquisition, Chit. Forms, 340.

(m) *Townsend v. Burns*, 1 Dowl. 629; 1 C. & M. 176, S. C.

(n) *Hoop, ell v. Leigh*, 3 Scott, 138.

(o) See the form, Chit. Forms, 328, &c.: 10 Went. 430, 442, 448, 435, 456.

(p) See Chit. Forms, 328, 334.

(q) 2 Saund. 72, n.

SECT. 2.

Reference to the Master.

As to the nature of the demand to ascertain which a reference to the master may be substituted for a writ of inquiry, see *ante*, 707, 708.

What Causes of Action may be referred.

Although the bill or note, &c., has been destroyed, the rule may still be obtained (*r*). Where it appeared, upon affidavit, that the bill had been stolen out of the attorney's pocket, the court ordered the usual reference to the master, upon production of a copy (*s*). On an application to the court for a rule to compute without production of the bill, the court declined to give any opinion as to the necessity of production, but granted the rule, leaving the question to the decision of the master (*t*).

Where the Bill, &c., is not forth coming.

Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the term, the court granted a rule to compute principal and interest on the bill on which the action was brought (*u*).

After Death of Plaintiff.

Upon demurrer to one count, (on a bill of exchange), and judgment for the plaintiff; and a plea to the other counts, upon which issue was joined; the court granted a reference to the master, to see what was due to the plaintiff on the former (*v*).

On one of several Counts.

The mode of proceeding is thus:—In term time make an affidavit of the cause of action, and that interlocutory judgment has been signed (*w*). Annex this affidavit to a motion paper, and give it to counsel to move to have the matter referred to one of the masters, and the court will thereupon grant a rule nisi (*x*). In the case of bills of exchange and promissory notes, this is a motion of course (*y*). It may be made on the same day the interlocutory judgment is signed for want of a plea, or for not producing the record on *nil tiel* record pleaded (*x*); or at any time afterwards. Where, however, such judgment is signed upon demurrer, the practice is not to move for a rule absolute till the following day (*z*). The rule can, it seems, in no case be obtained till judgment has been, in fact, signed, whether for want of a plea or on demurrer, or for not producing an alleged record (*z*). Draw up the rule with one of the masters, and serve a copy of it on the defendant's attorney; or on the defendant, if he have not appeared. If there be several defendants, a service of the copy of the rule on one will, it seems, suffice (*a*). The original rule need not be shewn unless sight thereof be demanded (*b*).

How obtained in Term Time.

(*r*) *Clarke v. Quince*, 3 Dowl. 26.
(*s*) *Brown v. Messiter*, 3 M. & Sel. 281:
and see *Allen v. Miller*, 1 Dowl. 420.

(*t*) *Sanderson v. Lee*, 7 Dowl. 97. As to the necessity of production in case of writ of inquiry, see *ante*, 718.

(*u*) *Berger v. Green*, 1 M. & Sel. 229.

(*v*) *Duperoy v. Johnson*, 7 T. R. 473.

(*w*) See the form, Chit. Forms, 342. The affidavit for a rule to compute on a bill of exchange may describe the defendant by initials, if he so signed the bill, and is so described in the writ. The affidavit in such a case should shew the form of signature to the bill. (*Hilbert v.*

Wilkins, Bail Court, M. 1839, *Littledale*, J.)

(*x*) *Pocock v. Carpenter*, 3 M. & Sel. 109; *Haywood v. Chambers*, 5 B. & Ald. 752; 1 D. & R. 411, S. C.; *Russen v. Hayward*, 1 D. & R. 444; 5 B. & Ald. 752, S. C.; see *Gordon v. Corbett*, 3 Smith, 179.

(*y*) See *Hoard v. Hunt*, C. P., M. 1838; 8 Jurist, 24.

(*z*) *Moses v. Compton*, 6 M. & Sel. 381.

(*a*) *Figgins v. Ward*, 2 Dowl. 364; 2 C. & M. 424, S. C.: see *vide Flint v. Bignell*, 1 Chit. Rep. 466, n.

(*b*) R. H., 2 W. 4, r. 51: see *Belairs v. Poultney*, 1 Chit. Rep. 466, n.

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Service of the rule at a house where the defendant's family are still living, though he himself had gone away, has been held sufficient, without leave of the court (c); and service by leaving the rule at the chambers of the defendant, and the person resident there stating that he had transmitted it to him, has been held sufficient (d). Where an attorney had been served with process at chambers, from which he afterwards went away to an unknown residence, a rule to compute was allowed to be served by leaving a copy at those chambers, (they being his last place of abode), and sticking up another in the Queen's Bench Office (e). It may be as well to observe, that no irregularity previous to the judgment can be shewn as cause against the rule; but a cross rule must be obtained to set aside the judgment; and pending which rule, the court will enlarge the rule to refer (f). In cases where a rule nisi only is granted, *if no cause be shewn, get counsel to move to make the rule absolute, upon an affidavit of service (g).* When you obtain the rule absolute, either in the first instance or after a rule nisi, draw it up with one of the masters, serve a copy of it on the defendant's attorney, or on the defendant, if he have not appeared (h). Also, if the defendant has appeared by himself or his attorney, serve on him a notice of the intended taxation of costs, one day or more before the taxation, as in other cases (i). Then take the rule absolute to one of the masters, who will thereupon compute the sum due to the plaintiff for principal and interest; tax the costs, and sign judgment as usual. You may then sue out execution as usual (k). In the Court of Common Pleas, it is necessary for the plaintiff to give notice to the defendant of the time appointed by the master for computing the principal and interest, in analogy to the practice upon writs of inquiry (l). But no such notice is requisite in the Queen's Bench or Exchequer (m).

How, in Vacation.

In vacation the rule may be obtained by application to a judge at chambers. For this purpose take out a summons for the defendant to shew cause why it should not be referred to one of the masters to compute principal and interest, &c. Serve a copy on the defendant's attorney, or on the defendant if he have not appeared; and if no cause be shewn, the judge will grant his fiat to one of the masters, to make out the rule (n). Take the order to the master; draw up the rule, and proceed as is above directed. In some cases the judge might require the usual affidavit of the cause of action, and that interlocutory judgment has been signed.

Judgment, how entered after.

If your roll have been already carried in, *one of the masters, or his clerk, will enter the judgment, upon your leaving the rule above mentioned with him for that purpose.* Otherwise, you must get a roll, and enter the proceedings upon it (o), and then docket and carry in your roll (p). The declaration frequently contains other counts, besides the count or counts upon the bill

(c) *Payett v. Hill*, 2 Dowl. 688.

(d) *Carew v. Winslow*, 5 Dowl. 543.

(e) *Sealey v. Robertson*, 2 Dowl. 568.

(f) *Pell v. Brown*, 1 B. & P. 369; *Maryatt v. Winkfield*, 3 Chit. Rep. 119.

(g) See Chit. Forms, 343.

(h) *Bank of England v. Atkins*, 1 Chit. 466; *Dawson v. Stoddard*, Id. Service of the rule nisi on the mother of the defendant at his residence, held sufficient.

(Warren v. Smith, 2 Dowl. 216).

(i) See post, Book IV. Part I. Ch. 31.

(k) See Chit. Forms, 344.

(l) *Bramming v. Patterson*, 4 Taunt. 487.

(m) MS. K. B.: *Huckfield v. Kendall*, 1 Chit. Rep. 693.

(n) See the form, Chit. Forms, 343.

(o) See form of the entry, Chit. Forms, 343.

(p) See Chit. Forms, 343, 334.

of exchange, &c.; and, as damages are assessed upon the counts upon the bill of exchange, &c., alone, a *remittitur damna* as to the other counts must be entered on the roll, in entering the judgment (*q*). But, where in such a case payment has been made generally on account of the action after declaration delivered, the plaintiff cannot enter a *remittitur damna*, nor can he have a rule to compute unless by consent (*r*). Where the roll contained an award of a writ of inquiry, and afterwards an assessment of damages by the court, upon a writ of error being brought for this cause, it was urged, on the authority of *Blackmore v. Flemynq* (*s*), that, by the award of the writ of inquiry, the plaintiff had made his election to have his damages ascertained by a jury, and could not afterwards retract, and have his damages assessed by the court; the court, however, affirmed the judgment (*t*).

SECT. 3.

Writ of Inquiry in Debt on Bond.

In what Cases necessary, 723.

Before whom executed, 725.

Proceedings on, after Judgment by Default, 726.

Proceedings on, after Judgment

on Demurrer or Nul Tiel Record, 728.

Proceedings on, upon Issue joined, *id*.

Scire Facias after, 729.

In what Cases necessary.] By stat. 8 & 9 W. 3, c. 11, s. 8, "In all actions which shall be commenced or prosecuted in any of his majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained," — [whether the covenant, &c., be contained in the same, or in any other deed or writing (*u*); and the statute extends to bonds, &c., for the payment of money by instalments (*x*), for the payment of an annuity (*y*), for the performance of an award (*z*), or for the performance of any other specific act, excepting for the payment of a sum of money in gross at a certain time, as *post-obit* bonds (*a*), and excepting other bonds for the payment of monies, which are provided for by the 9 A. c. 16, s. 13 (*b*), and excepting the case of a bail-bond (*c*), a

In what Cases necessary.

(*q*) See Chit. Forms, 343: *Fleming v. Langton*, 1 Str. 532: *Duperoy v. Johnson*, 7 T. R. 473: *ante*, 710: *Herald v. Johnson*, 2 Smith, 44.

(*r*) *Jones v. Sheil*, 6 Dowl. 579.

(*s*) 7 T. R. 446.

(*t*) *Gould v. Hammersley*, 4 Taunt. 148.

(*u*) *Collins v. Collins*, 2 Burr. 824, 826: *Hurst v. Jennings*, 5 B. & C. 650; 8 D. & R. 424, S. C.

(*x*) *Willoughby v. Swinton*, 6 East, 550; 2 Smith, 636, S. C.: see *Maxfen v. Touchet*, 2 W. Bl. 706, 958: *Van Sandau v. —*, 1 B. & Ald. 214.

(*y*) *Wa'cot v. Goulding*, 8 T. R. 126.

(*z*) *Welch v. Ireland*, 6 East, 613; 2 Smith, 666, S. C.: *Hanbury v. Guest*, 14 East, 401.

(*a*) 2 Camp. 285. n.: *Murray v. Earl of Stair*, 2 B. & C. 82, 89; 3 D. & R. 78, S. C.

(*b*) *Cardozo v. Hardy*, 2 Moore, 220: *Smith v. Bond*, 10 Bing. 131; 3 M. & Scott, 528, S. C.

(*c*) *Moody v. Pheasant*, 2 B. & P. 446. The reason why a bail-bond and replevin-bond are not within the act is because the courts of law can afford relief to the defendant in actions on them; and there-

replevin-bond (*d*), the bond of a petitioning creditor (*e*), and a bond for replacing stock (*f*), or a bond for payment of money by instalments, with a clause that all shall be due on one default (*g*), or indeed any bond where the damages to be assessed by the jury would be calculated to meet and satisfy the entire condition of the bond (*h*),]—“the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff upon the trial of the issues shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions: and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize or *Nisi Prius*”—[or now in cases within the 3 & 4 W. 4, c. 42, s. 16, post, 725, before the sheriff]—“of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby: in which writ it shall be commanded to the said justices or justice of assize or *Nisi Prius*, that he or they shall make return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay unto the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain, continue, and be as a further security, to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, terretenant, or his executors or administrators, suggesting

fore such cases do not fall within the rule which produced the statute, viz. that the defendant in actions on bonds for the performance of covenants, and the like, must proceed for relief in a court of equity.

(*d*) 2 Saund. 187, n. 2; Middleton v. Bryan, 3 M. & Sel. 155. See note (*c*) ante,

723.

(*e*) *Smith v. Broomhead*, 7 T. R. 300: *Smithy v. Edmonson*, 3 East, 22.

(*f*) *Savile v. Jackson*, 13 Price, 715.

(*g*) *James v. Thomas*, 5 B. & Ad. 40.

(*h*) See *Smith v. Bond*, 10 Bing. 125; 3 M. & Scott, 528, S. C.

other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution should not be had or awarded upon the said judgment upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid." The defendant is accountable only to the extent of the *penalty*; and as soon as that is recovered, or if the defendant choose to pay it into court, the plaintiff can proceed no further, but, on the contrary, may be compelled to enter satisfaction on the record (*i*). The statute of 8 & 9 W. 3, was made in favour of defendants, and receives a liberal construction (*j*). It has been consequently ruled, that the statute is obligatory; and although it enacts, that the plaintiff "may" assign, "may" suggest, &c., yet the word "may" is compulsory, and the plaintiff *must* assign or suggest the breaches, otherwise the proceedings will be erroneous (*k*). The statute is confined only to actions of debt (*l*). It does not apply to a judgment entered up on a warrant of attorney to confess a judgment on a *mutuatus*, and this, though a bond be also given (*m*). Nor does it extend to cases at the suit of the crown (*n*).

Before whom Executed.] The statute of 8 & 9 W. 3, which renders this writ of inquiry necessary, so far as it requires the writ of inquiry to be executed before the justices of assize or *Nisi Prius*, is, in cases where breaches are suggested on the roll after a judgment for the plaintiff on *demurrer*, or by confession, or *nil dicit*, and perhaps in all cases where no issue is joined, altered by the recent act 3 & 4 W. 4, c. 42, s. 16, which, to prevent delay, enacts that all writs issued under 8 & 9 W. 3, "shall, *unless the court where such action is pending, or a judge of one of the said superior courts, shall otherwise order*, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such *sheriff*, instead of the justices or justice of assize or *Nisi Prius* of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the court from whence the same shall issue at a day certain, in *term* or in *vacation*, in such writ to be mentioned; and such proceedings shall be had after the return of such writ, as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or *Nisi Prius*." It seems that this latter act does

Before whom
Executed.

(i) 1 Saund. 58 a, n. 1: *Branquin v. Perrott*, 2 W. Bl. 1190: *Wilde v. Clarkson*, 6 T. R. 303: *Shutt v. Procter*, 2 Marsh. 227: *Overseers of St. Martin v. Warren*, 1 B. & Ald. 491: see *Lonsdale v. Church*, 2 T. R. 388.

(j) *Hardy v. Bern*, 5 T. R. 637.

(k) *Haray v. Bern*, 5 T. R. 636: *Roles v. Roswell*, Id. 538, 540: *Drage v. Brand*, 2 Wils. 377: *Godwin v. Crowle*, 1 Cowp. 359.

(l) 1 Saund, 58 b, (n), 5th ed.

(m) *Ante*, 683.

(n) *R. v. Peto*, 1 Y. & J. 171.

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not extend to cases where the plaintiff assigns breaches of the condition of the bond, &c., in his declaration or replication (o).

Proceedings
after Judgment by
Default.

Proceedings after Judgment by Default.] If the writ of inquiry is to be executed before the sheriff, enter the proceedings on the roll, as in the case of a judgment by default in debt, omitting these words in the judgment: "By the court here adjudged and with his assent; and the defendant in mercy," &c. Then, in a new paragraph, suggest the breaches for which you seek damages; and in the same paragraph enter an award of a writ of inquiry (p). This suggestion of breaches, however, would be unnecessary if the breaches have been already assigned in the declaration. Make a copy of the breaches, when thus suggested, and serve it on the defendant or his attorney or agent, if he has employed one in the action. Serve also the notice of inquiry, as ante, 714, to inquire of the truth of the breaches suggested, and to assess the damages (q). Then sue out the writ of inquiry (r) as directed ante, 713, to be executed before the sheriff; deliver it to the sheriff, who will thereupon summon the jury, and the writ will be executed before the sheriff or his deputy. It seems that a copy of the writ should, in this case, be delivered to the defendant or his attorney or agent (s). The same practice as to attending by counsel, subpoenaing witnesses, and the mode of executing the writ of inquiry in ordinary cases, as noticed ante, 717 to 719, will apply to this case.

Leave to try
at Sittings or
Assizes.

If you are desirous that the writ shall be executed before the chief justice at the sittings if the venue is laid in Middlesex or London, or before a judge of assize if the venue is laid in any other county, it is necessary that you should obtain leave of the court or a judge for that purpose (t). It is only, however, where some difficult or important question of law or fact is likely to arise in the course of the inquiry, that this indulgence will be granted; and the mere difficulty or importance of the facts will not, it seems, induce the court or a judge to grant it when the venue is laid in Middlesex or London (u); for the under-sheriff of Middlesex, and the secondary in London, are generally men of experience, and fully competent to conduct a business of this kind.

When
granted.

How Ob-
tained and
Acted on.

The application should be made as directed ante, 713, 714. Having obtained and drawn up the rule as there directed, enter the proceedings on the roll, with the suggestion of the breaches, and make and serve a copy of such breaches, and the notice of the inquiry, as directed supra. Then sue out a writ of inquiry, as directed ante, 713, to be executed before the chief justice at the sittings, or the judges of assize at the assizes, according to the county in which the venue was laid (x); deliver it with the rule to the sheriff, who will thereupon summon a jury, and annex the panel to the writ; then deliver the writ and panel to the associate. And, lastly, you must make out a copy of the record on plain paper or parchment, for the chief justice or judges of assize, and leave it with the marshal when you enter the cause. If you desire to have a better sort of common jury, see ante,

(o) See Tidd's Supp. 1833, 135.

(p) See the form, Chit. Forms, 344: 2 Saund. 187 b, n. (e), 1 Saund. 58 d.

(q) See Chit. Forms, 349.

(r) See the form, Chit. Forms, 346.

(s) Gillingham v. Waskett, 13 Price, 791;

M'Clell. 568, S. C.

(t) 3 & 4 W. 4, c. 42, s. 16.

(u) See 1 Sellon, 344.

(x) See the forms, Chit. Forms, 349.

714. When the cause is called on, the inquest is taken precisely in the same manner as a cause is tried at *Nisi Prius* (y).

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The Evidence.

As to the *evidence* on executing a writ of inquiry in general, see *ante*, 717, 718. The plaintiff need not prove the breaches if they have been assigned, or any averments contained in the declaration. But he must prove all averments and breaches (if any) that have been *suggested* in the record after judgment (z). In an action on a bond against a surety, it was held, that if non-payment by the principal, after notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue; though, if the breach be suggested in the record under the statute after judgment (a). So, on the execution of the writ of inquiry after judgment on demurrer, the execution of an instrument, which the defendant has stated in setting out the condition of the bond in his plea, need not be proved (b). Where, in debt on bond conditioned for the performance of covenants in an indenture, &c., or of an award, judgment is suffered to pass by default, and breaches are *suggested*, the plaintiff must prove the condition of the bond, the award, indenture, &c., as well as the breaches (c). The defendant cannot offer evidence in excuse for the non-performance of the condition (d).

The 3 & 4 W. 4, c. 42, s. 18, provides, "that, at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, *costs shall be taxed, judgment signed, and execution issued forthwith*, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge, before whom such trial shall be had, shall *certify under his hand* (e), upon such writ, that *judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial*, or a judge of any of the said courts shall think fit to order that *judgment or execution shall be stayed till a day to be named in such order*."

Final Judgment, when signed, and Execution issued.

If the inquiry was executed before the sheriff, *the inquisition and return will be framed* (f) *and procured as directed ante*, 719, 720. *You may then proceed to tax your costs, and sign judgment as you would upon a verdict of a jury, after a trial before the sheriff, on a cause of action not exceeding 20l., as directed ante, Vol. I., 333, 334.* If it was executed before the chief justice or justices of assize, *the associate will prepare the inquisition, and have it sealed with the seal of the chief justice or justices of assize, and annex it to the writ of inquiry. You may then proceed to tax your costs, and sign judgment as upon a postea, as directed ante, Vol. I. 333.* The costs may be taxed and judgment signed immediately after the inquest found, even on the same day (g).

How Signed, and Costs taxed.

(y) See *ante*, Vol. I. 264.

(z) See 1 Saund. 58 a, 5th ed.

(a) *Barwise v. Russell*, 3 C. & P. 608: and see *Archbishop of Canterbury v. Robertson*, 1 C. & M. 690.

(b) *Collins v. Rybot*, 1 Esp. Rep. 157.

(c) 1 Saund. 58 d: see *Bartlett v. Pentland*, 1 B. & Ad. 704.

(d) *Archbishop of Canterbury v. Robert-*

son, 1 C. & M. 404.

(e) See a form, Chit. Forms, 341: but instead of the words "to set aside the execution of the within writ," say, "for a new writ of inquiry."

(f) See the form, Chit. Forms, 350.

(g) *Nicholls v. Chambers*, 2 Dowl. 693; 1 C., M. & R. 385, S. C.

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Entry of Proceedings on Roll.

The remaining proceedings are entered upon the roll thus :— after the award of the writ of inquiry, make an entry of the return of it and of the inquisition; then follows the judgment for the debt, damages, and costs, as in the usual form in debt; then an award of a writ of execution against the defendant's goods, lands, or person; and, lastly, if the writ be executed, follows the entry of the sheriff's return to the writ of execution, and of an acknowledgment of satisfaction by the plaintiff as to the amount levied (*h*). The judgment above mentioned includes the costs of the inquiry, but not the damages given by the inquest (*i*).

Form of Execution.

The writ of execution must, of course, pursue the judgment, and be for the penalty, nominal damages, and costs, with interest at £4 per cent. from the day on which judgment was entered, or from the 1st of October, 1838, if judgment was entered before that day (*j*); but it must be indorsed to levy only the damages given by the inquest and costs of increase, and interest on those sums, together with the reasonable charges and expenses of executing the writ (*k*).

Proceedings after Judgment on Demurrer or nul tiel Record.

Proceedings after Judgment on Demurrer or nul tiel Record.] The proceedings are the same as when judgment is allowed to pass by default. The judgment for plaintiff upon demurrer, &c., in debt is entered, omitting the latter words of it, in the same manner as in the judgment by default above mentioned; then follows the suggestion of breaches, if the breaches have not already been assigned in some of the previous pleadings. The remainder of the proceedings are the same as above stated.

Proceedings upon Issue joined.

Proceedings upon Issue joined.] The best way of declaring on a bond, &c., of the description above mentioned, if you expect to obtain a judgment by default, is to set forth in the *declaration* the condition of the bond, and assign the breaches therein: otherwise it is best to declare as upon a common money bond (*l*); in that case the defendant, if he pleads, usually sets forth the condition upon *oyer*, and pleads *performance*; the plaintiff in his replication assigns the breaches; and the defendant in his rejoinder takes one issue on each of them.

The Issue, how made up, and Form of.

The issue is, in the last-mentioned case, made up and delivered, and tried as in ordinary cases (*m*). If the defendant, however, instead of pleading performance, plead any other plea which *cannot lead to an issue upon the breaches*, but upon which the plaintiff, if he recovers, must have judgment *quod recuperet*, (if, for instance, to a declaration as upon a common money bond, he plead *non est factum* (*n*), or *non est factum* and that the bond was obtained by fraud and covin (*o*), or the like), the plaintiff in making up the issue, immediately after entering the pleadings, must *suggest* the breaches, and then

(h) See the form of the entry, Chit. Forms, 351: 1 Saund. 58 c; 2 Id. 187.

(i) See *Hankin v. Broomhead*, 3 B. & P. 607.

(j) See 1 & 2 V. c. 110, s. 17, and the forms of writ of execution framed by the judges, 5 Bing. N. C. 366.

(k) 1 Saund. 59 b, n. 1. See the form,

Chit. Forms, 351.

(l) See, as to the advantages of each mode of declaring, 2 Chit. PL 6th ed. 286.

(m) *Ante*, Vol. I. 199, &c.

(n) *Ethersey v. Jackson*, 3 T. R. 255.

(o) *Humfray v. Rigby*, 5 M. & Sel. 60.

enter the award of the *venire* (*p*). Or if the issue have been already delivered without the suggestion, then take out a summons before a judge, for the defendant to shew cause why a suggestion of breaches should not be entered on the record; and upon the judge's order being obtained for that purpose, and served in the usual way, deliver a fresh issue, including the suggestion (*q*).

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Where the breaches are assigned in the declaration (*r*) or replication (*s*), the jury may assess damages without a special *venire*. Form of Verdict.

As to the *evidence*, see, in general, *ante*, Vol. I. 212, &c. Where defendant pleads *non est factum* only, and the plaintiff suggests breaches, defendant cannot at the trial give in evidence anything in excuse for the non-performance (*t*). As to what evidence is, in general, admissible under *non est factum*, see Vol. I. 191. The Evidence.

The *verdict* for plaintiff is the same as in ordinary cases; but the jury must also assess damages for the breaches. The Verdict.

The *judgment* for plaintiff is, that he recover the debt, and 1s. damages for the detention thereof, together with 40s. costs, and the costs of increase; the latter, of course, including the costs of the trial (*u*). The Judgment.

The writ of *execution* must pursue the judgment; but it must be indorsed to levy only the damages found upon the breaches, the costs of increase, with interest on those sums at £4 per cent. from the day of entering judgment, or from 1st October, 1838, according as judgment was entered before or after that day (*v*), and the expenses of the execution, as mentioned *ante*, 728. Form of Execution.

Scire facias.] If, after the first inquisition or trial, the defendant be guilty of any further breaches, as the statute says, that in such a case the judgment already signed shall remain as a security to the plaintiff, the plaintiff, in order to obtain damages, must sue out a *scire facias* on the judgment, and thereupon suggest the further breaches (*x*); and upon the defendant's pleading thereto, or making default, the plaintiff must proceed in the manner above directed. If the plaintiff obtain a judgment by default, he must issue a writ of inquiry (*y*). The judgment will be the common judgment in *scire facias*, namely, an award of execution. The execution will be for the amount of the debt and costs, as above mentioned, but indorsed to levy the damages, and the costs of the *scire facias*, only. See further as to the *scire facias*, *post*, Book III. Part I. Ch. 3. Scire Facias.

(*p*) *Ethersey v. Jackson*, 8 T. R. 255.

(*q*) *Ethersey v. Jackson*, 8 T. R. 255; and see *ante*, Vol. I. 203; *Hanbury v. Guest*, 14 East, 401. See the form of the issue, where the breaches are assigned in the pleadings, Chit. Forms, 48; and of the jury process thereon, Id. 69; of the issue, where the breaches are not assigned in the pleadings, Id. 47; and of the jury process thereon, Id. 70; of the *postea*, judgment, and execution for plaintiff, Id. 93, 104, 148; and of the entry upon the

roll, Id. 104.

(*r*) *Quin v. King*, 1 M. & W. 42.

(*s*) *Scott v. Staley*, 4 Bing. N. C. 724; 6 Dowl. 714, S. C.

(*t*) *Ante*, 727: *Archbishop of Canterbury v. Robertson*, 1 C. & M. 690.

(*u*) 1 Saund. 58 b, n. See the form, Chit. Forms, 351.

(*v*) See 1 & 2 V. c. 110, s. 17.

(*x*) See the forms, Chit. Forms, 354.

(*y*) See a form of writ of inquiry. 3 Chit. Pl. 1198, 6th ed.

BOOK III.

PART I.

PROCEEDINGS IN PARTICULAR ACTIONS.

CHAPTER I.

EJECTMENT.

- SECT. 1. *Proceedings in Ejectment, in ordinary Cases*—730 to 769.
2. *Proceedings in Ejectment, on a vacant Possession*—770 to 772.
3. *Proceedings in Ejectment by Landlord for Non-Payment of Rent*—772 to 776.
4. *Proceedings in Ejectment by Landlord, under stat. 1 G. 4, c. 87*—777 to 783.
5. *Proceedings in Ejectment by Landlord, under stat. 11 G. 4 & 1 W. 4, c. 70, ss. 36, 37*—783 to 785.
6. *Action for mesne Profits*—785 to 787.

SECT. 1.

Proceedings in Ejectment in ordinary Cases.

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| <p>1. <i>Nature of the Action</i>, 731.</p> <p>2. <i>The Declaration</i>, 733.
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1. *Nature of the Action.*

WHENEVER a person entitled to land has a right of entry, he may, if the premises be unoccupied and vacant (*a*), in a peaceable manner and without using such violence as would amount to a forcible entry, enter and take possession without any legal formality (*b*). In general, however, and especially if the right of entry be fairly contested, it is best to proceed by an action for its recovery.

1. Nature of the Action.

Right to enter upon Land without Action.

Whenever the right of entry is taken away, the right to recover in an action of ejectment is also gone, and before the statute of 3 & 4 W. 4, c. 27, the effect of discontinuance, descents cast, &c., in taking away the right of entry, made it necessary in some cases for the party entitled to resort to a real action (c). But that statute has abolished all modes of tolling a right of entry, (except by lapse of time), and done away with all real and mixed actions, except writ of right of dower, dower, *quare impedit*, and ejectment, which latter is therefore now the only action for the specific recovery of land. An action for not delivering possession may in some cases be maintained, but damages only (and not the land itself) can be recovered in that form of action (d).

Ejectment.
 the only Action
 for the
 specific Recovery
 of Land.

The same statute fixes the length of time necessary to take away a right of entry, or, in other words, the period of limitation in the action of ejectment. *Sect. 2* enacts, that, after the 31st December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which

Period of Limitation.

(a) See *Hilary v. Gay*, 6 C. & P. 284. But it may be questioned, whether in strictness the landlord is liable in any civil action, though he is subject to be indicted for forcible entry. (See *Turner v. Megmott*, 1 Bing. 158; 7 Moore, 574, S. C.)

(b) *Taylor v. Cole*, 3 T. R. 295: see

Taunton v. Costar, 7 T. R. 431; *Turner v. Meymott*, *supra*; *Butcher v. Butcher*, 7 B. & C. 399; 1 M. & R. 220, S. C.; *Doe Roby v. Maisey*, 8 B. & C. 767; *Wildbore v. Rainforth*, *Id.* 4.

(c) Rose, on Real Actions, 81, &c.

(d) See *Coe v. Clay*, 5 Bing. 440.

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the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same (*e*). By *sect. 15*, the period is enlarged to five years after the passing of the act in all cases where the possession was not adverse at the time of its passing (*f*); and by *sect. 16*, in cases of disability from infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, to ten years after the cessation of the disability or the death of the person under the disability, whichever shall have first happened (*g*). But subject to the proviso in *sect. 29*, that lands and rents may be recovered by spiritual and eleemosynary corporations sole, within two incumbencies and six years or (in case that period should not amount to sixty years, within) sixty years, the extreme period under any circumstances is fixed by *sect. 17* at forty years after the right shall have first accrued (*h*).

By a subsequent stat. of 7 *W. 4* & 1 *V. c. 28*, to amend the 3 & 4 *W. 4, c. 27*, it is enacted, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding."

It may be well to notice the effect of the statute in facilitating the gaining a lawful title through actual possession, by annulling the effect of mere entry, continual claim, *possessio fratris*, and other modes of constructive possession (*i*); and requiring a written acknowledgment (*j*) from the party in possession or in receipt of the profits of the land to the person really entitled, or his agent, as the only equivalent to actual possession so as to preserve the right of entry, and prevent the statute from running, in cases where some other than the person really entitled is in possession or in receipt of the profits of the land. It would be exceeding the limits of this Work to refer more particularly to the important provisions of the statute.

Actual Entry,
or Notice,
when necessary,
before
Action.

An actual entry upon the premises sought to be recovered, or a claim where an actual entry is impracticable, or a notice given to the tenant to quit at the end of his period of tenancy, or a demand of possession, is in some cases necessary before an action of ejection is commenced. An actual entry into lands is only necessary to avoid a fine with proclamations (*k*), and

(*e*) See s. 3 as to when the right is deemed to have accrued.

(*f*) *Dee v. Thomson*, 1 Nev. & P. 215. A wrongful continuing in possession, though the original entry was rightful, is an adverse possession. (*Doe v. Gregory*, 4 Nev. & M. 308).

(*g*) No further time is to be allowed in case of a succession of disabilities, s. 18.

(*h*) *Doe v. Bramston*, 3 A. & E. 63; 4 Nev. & M. 664, S. C.

(*i*) Sects. 10, 11, 12, 13. See *Napean v.*

Doe d. Knight, 2 M. & W. 894.

(*j*) Sect. 14. See form, *Chit. Forms*, 358. This acknowledgment takes effect as the possession of the person really entitled at the date of the acknowledgment. It does not require a stamp. (See *Barry v. Goodman*, 2 M. & W. 768).

(*k*) *Berrington v. Parkhurst*, 2 Stra. 1086; *Doe Compere v. Hicks*, 7 T. R. 433; 1 Saund. 319 b, &c.: *Adams on Ejection*, 2nd ed. ch. 6: *Rosc. on Evid.* 4th ed. 414. Fines have been abolished, and other

in the case of vacant possession mentioned in the next section; in all other cases the entry, being confessed according to the terms of the consent-rule, is deemed sufficient. The entry to avoid a fine must be made within five years after the fine has been levied and the proclamations completed, provided the party be not an infant or a married woman, or insane, or beyond sea at the time, and then within five years after the disability ceases (7). And by 4 & 5 Anne, c. 16, s. 16, no entry or claim shall be of force to avoid a fine with proclamations (or be sufficient within the

Jac. 1, c. 16, the statute which until lately governed the period of limitations in ejectment) unless the action be commenced within one year afterwards. These statutes are never pleaded specially in ejectment, but may be given in evidence under the general issue.

A notice to quit is, in general, necessary in order to determine a tenancy from year to year. The notice must be to quit at the end of the year of the tenancy, and must be given at least half-a-year (182 days) previously, except when the rent is payable on the usual quarterly feast days, in which case notice given, or one to quit, on the next but one is sufficient (m). Where the letting is for less than a year, the time of notice must in general be equal to the period of the letting (n), such being the general usage. But in the case of an ordinary weekly or monthly tenancy, a week's or month's notice to quit is not implied as part of the contract, unless there be an usage requiring such notice (o), and the usage must be proved.

Notice to quit.

In cases of tenancy at will, the will must be determined by either the landlord or tenant before action brought (p). This is generally effected by a demand of possession on the part of the landlord, and the demise may be laid immediately after the demand, as the tenant is not *de jure* entitled even to a reasonable time for taking away his goods (q).

Determination of Tenancy at Will.

The court will exercise an equitable jurisdiction over the proceedings in an action of ejectment, which, for the purposes of justice and convenience, may be said to be peculiarly its own creature (r).

Equitable Jurisdiction in Ejectment.

2. The Declaration.

Form of.] Make out a draft of the declaration, and add a notice to appear at the bottom of it (s). Make as many copies as there are tenants. It should first be premised that the rules of M. T., 3 W. 4, extend only to personal actions, commenced by the process prescribed by the Uniformity of Process Act,

2. The Declaration.
Form of.

modes of assurance substituted for them, by the 3 & 4 W. 4, c. 74; but the necessity of an entry to avoid fines previously commenced must still be kept in mind, especially as no limit of time has been prescribed for completing them.

(7) 4 H. 7, c. 24.

(m) Rosc. on Evid. 4th ed. 420, 421, &c.: see the forms, Chit. Forms, 357, 358.

(n) Doe v. Hazell, 1 Esp. 94: Roe Peacock v. Raffan, 6 Esp. 4: but see Huffill v. Armitstead, 7 C. & P. 56.

(o) Huffill v. Armitstead, 7 C. & P. 56; 362.

per Parke, B.

(p) 2 Bl. Com. 146, &c.: see Roe v. Street, 4 Nev. & M. 42.

(q) Doe v. M'Kaag, 10 B. & C. 721. But, *semble*, he may enter to remove them without being subject to an action of trespass, provided he stays no longer than is absolutely necessary for that purpose, and does not disturb the landlord's possession.

(r) Per Bayley, J., in Thrustout v. Shenton, 10 B. & C. 111.

(s) See the forms, Chit. Forms, 359 to 362.

2 *W. 4, c. 39*, and do not extend to ejectment (*t*). Therefore the declaration in the Exchequer may still commence by stating the plaintiff to be the queen's debtor (*u*), though, indeed, such statement is unnecessary (*v*). The declaration also is usually intitled of the previous term, but it need not be intitled of a term or of a particular day as of a term, and it is sufficient if it be intitled of a particular day (*w*). And the omission of (*x*), or a mistake in, the title of the term is not, in general, material, provided the tenant has sufficient notice given to him to appear (*y*); and if both the day and term be stated correctly, a mistake in the year is of no consequence (*z*). But in a declaration dated merely of the term and year, a mistake in the year (*T.*, 6 *W. 4*, for *T.*, 7 *W. 4*) was held irregular, and rule for judgment refused (*a*). And the same where the declaration was dated of a term not yet arrived, and the notice had no date (*b*). In many cases, however, a similar error has been considered as cured by the date of the notice being correct (*c*). If the ejectment be by a landlord, where the tenancy has expired, or the right of entry accrued, in or after either of the *issuable* terms, and you propose proceeding to trial at the next assizes, under the provisions of the 11 *G. 4 & 1 W. 4, c. 70, s. 36*, (*post*, 783), then, according to those provisions, the declaration should be intitled of the day next after the day of the demise in such declaration; and this, whether the same be in term or vacation (*d*). The day of the demise may be laid after the title of the declaration. It should be laid on a day subsequent to the accruing of the lessor's title. A mistake in the venue of the margin is immaterial, if it be correctly stated in the body of the declaration (*e*). It is no objection to the declaration that no attorney's name is stated in it (*f*), nor, that the name of the parish is omitted (*g*). The declaration must not recite the original writ, as it formerly used to do, in proceedings by original; and if it does, the recital will not be allowed in costs (*h*).

The Notice to
Appear.
To whom
directed.

The Notice to Appear.] The notice to appear, at the bottom of the declaration, should, if possible, be directed to the tenant by his christian and surname (*i*). And notice directed to the personal representatives of a deceased tenant, without naming them, is bad (*j*). But a rule for judgment has been granted against the casual ejector, although, in consequence of the equivocation of the tenant's wife, the notice did not state the christian name (*k*); and in another case a rule was refused

(*t*) *Doe Gillett v. Roe*, 1 C., M. & R. 20; 2 Dowl. 690, S. C.: *Doe Haines v. Roe*, 2 Moo. & Sc. 619: *Doe Fry v. Roe*, 3 Id. 370: *Doe Evans v. Roe*, 2 A. & E. 11.

(*u*) *Doe Gillett v. Roe*, 1 C., M. & R. 20; 2 Dowl. 690, S. C.

(*v*) *Doe Blorham v. Roe*, 6 Dowl. 388.

(*w*) *Doe Ashman v. Roe*, 1 Bing. N. C. 253; 1 Scott, 166, S. C.

(*x*) Adams on Eject, 2nd ed. 181: Tidd, 9th ed. 1204.

(*y*) *Doe Gore v. Roe*, 3 Dowl. 5: *Goodtitle v. Ranger*, 2 Chit. Rep. 172: *Anon.*, Id.: *Anon.*, Id. 173: *Doe v. Roe*, 2 Dowl. 186: *Doe Crooks v. Roe*, 6 Dowl. 18¹.

(*z*) *Doe Smithers v. Roe*, 4 Dowl. 374.

(*a*) *Doe Gowlan v. Roe*, 5 Dowl. 273: and see *Doe v. Roe*, M. 1838, B. C.; 3 Jurist, 10.

(*b*) *Doe Giles v. Roe*, 7 Dowl. 579.

(*c*) *Doe Wills v. Roe*, 5 Dowl. 380: *Doe Erans v. Roe*, Id. 508: *Doe Crooks v. Roe*, 6 Dowl. 184.

(*d*) *Doe v. Roe*, 2 C. & J. 123.

(*e*) *Doe Goodwin v. Roe*, 3 Dowl. 323.

(*f*) *Doe Simpson v. Roe*, 6 Dowl. 469.

(*g*) *Doe v. Gunning*, 2 Nev. & P. 260.

(*h*) R. H., 2 W. 4, r. 4.

(*i*) *Doe v. Roe*, 1 Chit. Rep. 573 a: *Doe v. Badtitle*, Id. 215 a: Adams on Eject, 2nd ed. 202: *Doe v. Roe*, 1 Moore, 113: *Doe Atkins v. Roe*, 2 Chit. Rep. 179.

(*j*) *Doe St. Margaret v. Roe*, 1 Moore, 113.

(*k*) *Doe Warne v. Roe*, 2 Dowl. 517: see *Doe Pearson v. Roe*, 5 Moore, 73: *Doe v. Roe*, 6 Dowl. 629.

to set aside the service of a declaration in ejectment, on the ground that the notice was addressed to the tenant by a wrong christian name (*l*). For this would be, in effect, allowing a plea in abatement in ejectment. And the courts will be now less than ever inclined to favour such an objection since the abolition of the plea of misnomer in other actions by the 3 & 4 W. 4, c. 42, s. 11. It is usual, and advisable, to fix the names of all the tenants to such notice; but this is not, it seems, absolutely requisite, and it may be directed to the individual tenant who is served (*m*). Service of one of two tenants in possession with notice directed to the other is not good (*n*). It is, however, sufficient if each tenant be rightly named in his own notice, and mistakes in the names of the other tenants are immaterial, at least if their identity be sworn to (*o*).

Where the declaration was served with two notices annexed, one requiring the appearance of the defendant, and the other that he should enter into recognisances on his appearance, the latter was rejected as surplusage (*p*). The omission of the words "wheresoever" &c., in the notice in an ejectment by original, is not material (*q*). A notice omitting to state the consequence of not appearing, is defective, but a rule *nisi* to amend and sign judgment within a week has been granted (*r*). Where the notice was subscribed in the name of the plaintiff instead of the casual ejector, the mistake was held immaterial (*s*). It is no objection to the notice that it is dated of a day subsequent to the delivery of the declaration (*t*).

If the *venue* be laid in London or Middlesex, (and it must, of course, be laid in the county in which the premises lie, unless otherwise ordered by the court), the notice should require the tenant's appearance on the first day of the next term, (that is, the first day in full term), or within the first four days of the next term (*u*). But, if the *venue* be laid in any other county, the notice should be for the next term generally; and this, whether such term be issuable or not (*v*). A notice to appear "in due time" has been held bad (*x*). So has a notice to appear "in eight days of St. Hilary," instead of Hilary term generally (*y*). But, in another case, where the notice was of a wrong term, the court permitted it to be amended (*z*). And where the notice was dated the 9th of May, 1836, and required an appearance "next Easter term," (which literally meant Easter, 1837), a rule *nisi* for judgment was granted in Trinity term, 1836 (*a*). If the ejectment be by a landlord against his tenant, where the tenancy has expired, or

At what Time it should require Appearance.

(*l*) *Doe Stainton v. Roe*, 6 M. & Sel. 203: and see *Doe — v. Roe*, 1 Chit. Rep. 573, where the christian name was abbreviated: *Doe Smith v. Roe*, 6 Dowl. 629, where there were thirteen tenants in possession, and the christian names of two of them were omitted in all the notices: *Doe — v. Roe*, 6 Dowl. 629: *Doe Folkes v. Roe*, 2 Dowl. 567: *Doe Frost v. Roe*, 3 Id. 563. If there be any doubt as to the name, it will be safer to inform the tenant at the time of service that he is the person meant.

(*m*) *Doe Burliton v. Roe*, 7 T. R. 477: *Doe Pearson v. Roe*, 5 Moore, 73: *Doe v. Roe*, 2 C. & J. 670: *Doe Field v. Roe*, 1 H. & W. 516.

(*n*) *Doe Smith v. Roe*, 5 Dowl. 254.

(*o*) *Doe Peach v. Roe*, 6 Dowl. 62.

(*p*) *Doe Roberts v. Roe*, 5 Dowl. 508.

(*q*) *Doe Thomas v. Roe*, 2 Chit. 171.

(*r*) *Doe Darwent v. Roe*, 3 Dowl. 336.

(*s*) *Hazlewood v. Thatcher*, 3 T. R. 351: overruling *Peaceable v. Troublesome*, Barnes, 173.

(*t*) *Doe Evans v. Roe*, 2 A. & E. 11.

(*u*) *Holdfast v. Freeman*, 2 Str. 1049.

(*v*) See R. E., 2 G. 4.

(*x*) *Doe Forbes v. Roe*, 2 Dowl. 420.

(*y*) *Lackland v. Badland*, 8 Moore, 79.

(*z*) *Doe Bass v. Roe*, 7 T. R. 469: and see *Anon.*, 2 Chit Rep. 171. The tenant, however, ought, it seems, to be apprized in due time of the mistake.

(*a*) *Doe Watts v. Roe*, 5 Dowl. 149.

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the right of entry accrued in or after either of the issuable terms, and you purpose proceeding to trial at the next assizes, under the provision of the 11 *G. 4* & 1 *W. 4*, c. 70, s. 36 (*b*); then, according to those provisions, the notice should require the tenant to appear, and plead within *ten* days. In an ejectment, not against a tenant within these provisions, where the notice required the tenant to appear and plead within ten days, the court refused to set aside a judgment against the casual ejector for irregularity, the declaration and notice having been served before the term (*c*).

Amending
Declaration
and Notice.

Amending Declaration and Notice.] If the declaration be defective, the plaintiff may, in general, have leave to amend it, even after plea pleaded (*d*). Thus, leave has been given to amend the declaration, in the venue (*e*), in the demise (*f*), in the term stated in the demise (*g*), when it is clear the amendment would work no injustice to the opposite party (*h*), and in the parcels (*i*); and sometimes in the notice at the foot of it, in the time of appearance (*k*), in the statement of the consequences of not appearing (*l*), and in the name subscribed to it (*m*).

3. Service of Declaration.

3. Service of
Declaration.
When to be
made.

Service, when to be made.] As regards the *Time of the Service*:—It was formerly requisite that the declaration and notice should be served before the *essoign day* of the term (*n*); but now, by the rule of *T. T.*, 1 *W. 4*, “declarations in ejectment may be served before the *first day* of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the *essoign* or first general return-day.” The service cannot be effected on any of the days between Thursday next before and Wednesday next after Easter-day, that happens to fall within the time appointed for Easter term, such days being directed by 1 *W. 4*, c. 3, s. 3, to be deemed part of the term (*o*). When a tenancy has expired, or a right of entry has accrued to a *landlord*, in or after Hilary or Trinity terms, he may, under the 11 *G. 4* & 1 *W. 4*, c. 70, s. 36, at any time within ten days afterwards, serve a declaration in ejectment, specially intituled of the day next after the day of the demise

(*b*) *Post*, 783.

(*c*) *Anon.*, 1 Dowl. 18. It is not stated in the report of this case where the premises were situate. If not situate in London or Middlesex, it would seem the decision would not apply. And its correctness appears doubtful. (See *Doe Isherwood v. Roe*, 2 Nev. & M. 476).

(*d*) See cases in *Harr. L. & T.* 847, 848.

(*e*) *Imp. C. B.* 636.

(*f*) *Doe Hardman v. Pilkington*, 4 Burr. 2447; *Anon.*, 1 Chit. Rep. 536; *Doe Rumford v. Miller*, *Id.*: *Adams on Eject.* 199. In *Doe Beaumont v. Armitage*, 1 D. & R. 173; 2 Chit. Rep. 302, S. C., the court allowed the declaration to be amended by inserting a new count on another demise, even after three terms had elapsed, and the roll had been made up and carried in.

(*g*) *Roe Lee v. Ellis*, 2 W. Bl. 940; and see *Vicars v. Heydon*, Cowp. 841; *Doe v. Rendell*, 1 Chit. Rep. 535.

(*h*) *Doe Reynell v. Tuckett*, 2 B. & Ald. 773; *Bradney v. Hasseldine*, 1 B. & C. 121; 2 D. & R. 227, S. C.; and see *Har. L. & T.* 848.

(*i*) *Pr. Reg.* 16; *Anon.*, 1 Chit. Rep. 537, n.; *Doe Lawrie v. Dyball*, 8 B. & C. 70; 1 Moo. & P. 330, S. C., in error.

(*k*) *Doe Bass v. Roe*, 7 T. R. 469. The tenant ought, perhaps, to be apprized in time of the mistake. (*Anon.*, 2 Chit. Rep. 171).

(*l*) *Doe Darwent v. Roe*, 3 Dowl. 336.

(*m*) *Hazlewood v. Thatcher*, 3 T. R. 351; see *Goodtitle v. Notitle*, 5 B. & Ald. 849.

(*n*) *Doe Bird v. Roe*, Barnes, 172; *Roe Hambrook v. Doe*, 14 East, 441.

(*o*) *Doe Frodsham v. Roe*, 6 Dowl. 541.

in such declaration, whether the same shall be made in term or vacation, with a notice thereunto subscribed, requiring the tenant in possession to appear and plead thereto within ten days (*p*). The service must not be made on a Sunday; even where the declaration was left at the house of the tenant in possession on Saturday, and received by him on the next day, Sunday, it was held, that this was service of process on a Sunday, within the 29 C. 2, c. 7, s. 6, and void (*q*).

Service how made.] After the draft of the declaration has been prepared, engross it on plain paper; make as many copies of it as there are tenants in possession of the premises in dispute, and let a copy be served on each tenant before the first day of the next term. In serving the declaration, the notice at the foot of it should be read over, or at least the purport of it should be signified, and the nature and meaning of the service explained, to the person upon whom it is served, so as to be fully understood by him. It will not, it seems, suffice to read it over without explaining it (*r*), but it seems enough to explain it without reading it over (*s*); it would be more prudent to do both. Where the tenant was a Welshman, and did not know English, and the person who served him did not know Welsh, but got a neighbour to explain to him the nature of the declaration and notice, that was held sufficient (*t*). Service of the declaration before the first day of term, and explanation after it, will not suffice (*u*). If the tenant or his wife, &c., refuse to listen to the reading or explanation, or prevent it by turning out, or refusing to let in, the person endeavouring to effect the service, he ought to effect it as well as he can under the circumstances; for instance, by reading and explaining the notice loudly outside the door, and putting a copy of the declaration under it, and by posting another copy on some conspicuous part of the premises (*v*). Where a declaration was tendered to the tenant's wife in her shop, upon the premises, and the person serving it attempted to read to her the notice, but she refused to hear it, and left the shop, and the declaration and notice were thereupon left in the shop; the court were of opinion that the notice should have been read aloud in the shop, but they granted a rule to shew cause why this should not be deemed good service (*x*). Where the tenant's wife prevented the person serving it from giving an explanation or reading it over, the service was held sufficient (*y*). In another case, when the attorney, after explaining the contents of the declaration to the tenant's wife, was proceeding to read

(*p*) *Post*, 783; *Doe v. Roe*, 1 Dowl. 304; 2 C. & J. 123, S. C.

(*q*) *Doe Warren v. Roe*, 8 D. & R. 342; and see *Doe v. Roe*, Id. 592; 5 B. & C. 764, S. C.: but see *Goodtitle v. Thrustout*, Barnes, 183.

(*r*) *Doe Wade v. Roe*, 6 Dowl. 51, C. P.

(*s*) *Doe v. Roe*, 1 Dowl. 428; 2 Id. 199: see *Doe Downes v. Roe*, 4 Id. 566, in which case, on an affidavit merely stating that the tenant "appeared to be acquainted with the intent of the declaration," *Patteeon, J.*, said that the deponent ought to have shewn that he had read over and explained the notice, or, at least, that he had begun to do so, and was prevented by

the tenant from proceeding, but granted a rule *nisi*. And where the nature and object of the declaration were explained, but in consequence of the tenant's refusal it was not left with him, a rule *nisi* was granted. (*Doe Forbes v. Roe*, 2 Dowl. 452). Explanation to a foreigner by an interpreter not upon oath is sufficient. (*Doe Probert v. Roe*, 3 Dowl. 335).

(*t*) *Doe Probert v. Roe*, 3 Dowl. 335.

(*u*) *Doe v. Roe*, 1 D. & R. 563.

(*v*) See *Doe Summers v. Roe*, 5 Dowl. 552, and the numerous cases referred to in the following pages.

(*x*) *Doe Neale v. Roe*, 3 Wils. 263

(*y*) *Doe George v. Roe*, 3 Dowl. 541.

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PART I.

the notice, she said she could read it herself, and ran her eye over it as if she had read it; this was holden to be sufficient (*z*). And the same, where the tenant himself read it over, and said that he understood it (*a*).

When there
are several
Tenants.

Where different parts of the premises are in possession of different tenants, each of them must be served with a copy of the declaration, in order to obtain a rule for judgment against the casual ejector for the whole (*b*). And where premises were let on lease by A. to B., and B. underlet them to several persons—in ejection by A. it was held, that the declaration should have been served on all the tenants in possession (*c*); otherwise, only such part of the premises as were occupied by the tenants actually served could be recovered in the action. But a service of the declaration on one of two or more joint-tenants in possession is good service, if the notice to appear be addressed to all the joint-tenants (*d*). Where one of two joint-tenants is dead, and the service is on the survivor, the rule for judgment will be granted as against the survivor only (*e*). Parish officers cannot be considered as joint-tenants, and service on all is necessary (*f*). Where the tenants in possession were three sisters, not joint-tenants, service of declaration on two on the premises, and a copy left for the third, with the usual explanation, was held sufficient for a rule nisi (*g*).

Service in or-
dinary Cases
on the Tenant
or his Wife.

[*Service in ordinary Cases on the Tenant or his Wife.*] The declaration should regularly be served on either the tenant himself or his wife (*h*). On the tenant himself, it may be served anywhere (*i*), even out of the jurisdiction (*k*). On the wife, it may be served either on the premises or at the husband's house (*l*); or, it seems, anywhere else, provided she be living with her husband at the time (*m*); but in all other cases it must be served upon the premises. Service on the wife has been held sufficient, even where the husband had left the kingdom and settled abroad (*n*). It is not necessary to the validity of the service, however, that the tenant or his wife receive the copy of the declaration; it is sufficient if it be tendered to him or her; after which it may be left for them at the place where the tender was made (*o*). Where the person serving

(*z*) *Godright d. Waddington v. Thrustout*, 2 W. Bl. 800: and see *Doe Jones v. Roe*, 1 Dowl. 518.

(*a*) *Doe Jones v. Roe*, 1 Dowl. 518.

(*b*) *Doe Bromley v. Roe*, 1 Chit. Rep. 141.

(*c*) *Doe Lord Darlington v. Cock*, 4 B. & C. 259.

(*d*) *Doe Williamson v. Roe*, 10 Moore, 493: and see *Doe Bromley v. Roe*, 1 Chit. Rep. 141: *Doe Bailey v. Roe*, 1 B. & P. 369: *Doe Hutchins v. Roe*, 2 Dowl. 418: *Doe Clothier v. Roe*, 6 Dowl. 291.

(*e*) *Doe Hewson v. Roe*, 5 Dowl. 404.

(*f*) *Doe Weeks v. Roe*, 5 Dowl. 405.

(*g*) *Doe Grimes v. Roe*, 4 Dowl. 86; 1 H. & W. 369, S. C.

(*h*) *Godright v. Thrustout*, 2 W. Bl. 800: *Doe Neale v. Roe*, 2 Wils. 263. In *Doe Walker v. Roe*, 4 Moo. & P. 11, the service was on a woman who represented herself to be the tenant's wife, and it was held sufficient. And see *Doe Simmons v. Roe*, 1 Chit. Rep. 228: *Doe Smith v. Roe*,

1 Dowl. 614. See forms of affidavit of service, Chit. Forms, 362.

(*i*) *Tidd*, 1210: 2 Sellon, 96.

(*k*) *Doe Daniel v. Woodroffe*, 7 Dowl. 494.

(*l*) *Doe Graef v. Roe*, 6 Dowl. 456: *Doe Lord Southampton v. Roe*, 1 Hodges, 24: *Doe Morland v. Bayliss*, 6 T. R. 765: *Doe Baddam v. Roe*, 2 B. & P. 55: and see *Right v. Wrong*, 2 D. & R. 84: *Doe Boulott v. Roe*, 7 Dowl. 463.

(*m*) *Doe Briggs v. Roe*, 2 C. & J. 202; 1 Dowl. 312, S. C.: *Doe Wingfield v. Roe*, 1 Dowl. 693: *Doe Boulott v. Roe*, 7 Dowl. 463.

(*n*) *Doe v. Roe*, 1 D. & R. 514.

(*o*) *Bagshaw v. Toogood*, Barnes, 185: *Halsall v. Wedgwood*, Id. 174: *Farmer v. Thrustout*, Id. 180: and see *Douglass v. —*, 1 Str. 575: *Sprightly v. Dunch*, 2 Burr. 1116: *Anon.*, 2 Chit. Rep. 185: *Doe Courthorpe v. Roe*, 2 Dowl. 441: *Doe Forbes v. Roe*, 2 Id. 452: *Doe Visger v. Roe*, 2 Id. 449.

the declaration began to read and explain it to the tenant, but before he could deliver it, the tenant turned him out of the house, and he then thrust the declaration under the door, it was held sufficient (*p*); but in a similar case, where the clerk, instead of leaving the declaration, brought it away, *Parke, J.*, granted a rule *nisi* only (*q*).

The modes of service which may be adopted, where regular service on the tenant or his wife cannot be effected, will now be considered in the following order:—

Service on Child, Servant, &c., with Proof that Tenant received it before Term.] Service on a child or servant, or other person than the tenant or his wife, will not in general suffice. Even service on the tenant's attorney (*r*), or a receiver appointed by the Court of Chancery, (to manage an estate for an infant), is by itself insufficient (*s*). If, however, the tenant or his wife be not at home, and the declaration be served on his child or servant, or, as it seems, on any other person (*t*); and if it afterwards appear, from the acknowledgment of the tenant himself (*u*), or of his attorney (*v*), or from other sufficient evidence, that the tenant received the declaration before the first (*w*) day of the term, the service will be deemed sufficient (*x*). The wife's acknowledgment in such a case will not, in general, suffice (*y*). An acknowledgment made *within* the term of a receipt *before* the term, is sufficient (*z*). But unless it appears from the acknowledgment, or otherwise, that the declaration was received before the term, not even a rule *nisi* will be granted (*a*). In one case a rule absolute was granted for judgment against the casual ejector, where the service had been made on a person on the premises believed to have been left there by the tenant, who was out of the way, and also on her attorney; and a letter was sent by the two-penny post, according to the attorney's direction, to the tenant's last place of abode (*b*).

Also, where service has been effected on a servant, child, &c., on the premises, if only a reasonable probability of its having come to the tenant's hands before the first day of term is made out, a rule *nisi* for judgment will be granted. Thus, for instance, service of the declaration on a son of the tenant in possession, who said that his father was unable to attend to business, coupled with a subsequent admission by

(*p*) *Doe Frith v. Roe*, 3 Dowl. 569.

(*q*) *Doe Forbes v. Roe*, 2 Dowl. 452.

(*r*) *Doe d. Collins v. Roe*, 1 Dowl. 613.

(*s*) *Goodtitle d. Roberts v. Badtittle*, 1 B. & P. 385.

(*t*) *Doe Harris v. Roe*, 2 Dowl. 607.

(*u*) *Doe Hambrook v. Roe*, 14 East, 441; *Doe Agar v. Roe*, 6 Dowl. 624.

(*v*) *Doe Teverell v. Snee*, 2 D. & R. 5; *Anon.*, 2 Chit. Rep. 187; and see *Doe v. Roe*, 2 D. & R. 12; *Jenny d. Mills v. Cutts*, 1 Scott, 52.

(*w*) Before the rule of T. T., 1 W. 4, post, 736, it was necessary that the acknowledgment should be that he received it before the essoign day. (See *Doe v. Roe*, 5 B. & C. 764; *Doe Warren v. Roe*, 8 D. & R. 342; *Doe Hambrook v. Roe*, 14 East, 441; *Doe Halsey v. Roe*, 1 Chit. Rep. 100).

(*x*) See *Goodtitle v. Thrustout*, Barnes, 183; *Smith v. Hurst*, 1 H. Bl. 644. See form of affidavit of service in such a case,

Chit. Forms, 363.

(*y*) *Goodtittle v. Badtittle*, 1 B. & P. 384; *Doe James v. Staunton*, 1 Chit. Rep. 121; 2 B. & Ald. 371, S. C.; *Doe Briggs v. Roe*, 1 Dowl. 312; *Doe Wilson v. Smith*, 3 Id. 379; but see *Doe v. Roe*, 2 D. & R. 12, which case, however, seems to have been decided on some implied agency of the tenant's daughter; it was cited without effect in *Doe Finch v. Roe*, (5 Dowl. 225), and, as it would be unjust to allow the tenant to be prejudiced, even by the assertions of third persons, it seems absurd to call upon him to rebut their acknowledgments. See also *Doe Tucker v. Roe*, 2 Dowl. 775; 4 Moo. & Sc. 165, S. C.

(*z*) *Doe Smith v. Roe*, 4 Dowl. 265.

(*a*) *Doe Finch v. Roe*, 5 Dowl. 225; *Doe Brittlebank v. Roe*, 4 Moo. & Sc., 562; see *Doe Marsdall v. Roe*, 2 A. & E. 588; 4 Nev. & M. 553, S. C.

(*b*) *Anon.*, 2 Chit. Rep. 179.

Service on
Child, Ser-
vant, &c., with
Proof that
Tenant re-
ceived it be-
fore Term.

BOOK III.
PART I.

the wife of the tenant that he had received it, has been held sufficient to grant a rule *nisi*, calling on the tenant to shew cause why it should not be a good service (*d*). So, service on the son of the tenant in possession on the premises, coupled with a statement by the son that his father came home that night and received the declaration (*e*). So, where the service of the declaration was on an attorney, who represented himself to be the agent of the tenants in possession, and would appear for them, the court granted a rule *nisi* that it should be good service, and directed the rule to be served on the attorney (*f*). So, where the declaration was served upon a servant of the tenant on the premises, who promised to deliver it to her master, and it was afterwards, on the same day, seen in the hands of the tenant's attorney, a rule *nisi* was granted (*g*). And the same where the servant made an affidavit that she delivered the declaration to her master (*h*). And service on a servant, she stating her mistress to be too ill to be seen, and that she had given the declaration to her mistress, has been held sufficient for a rule *nisi* (*i*). But where the declaration was served on the brother-in-law of the tenant on the premises in S., the tenant being then seriously ill at W., and on the next day service was made on a person at the house where the tenant was, and, on the same day, he died; *Coleridge, J.*, refused the rule, saying, that it was not likely that any papers should have been delivered to the tenant in the state in which he then was (*k*). Service on the child of the tenant in possession on the premises is insufficient even for a rule *nisi*, unless it be shewn that he is living with his parent, and composes part of the family (*l*).

Service where
Tenant re-
sides abroad,
or evades Ser-
vice.

Service where Tenant resides Abroad or evades Service.] Where the tenant has absconded to another country (*m*), or resides abroad (*n*), or is clearly keeping out of the way to avoid being served (*o*), a copy of the declaration should be delivered, if possible, to his relation or servant, or some other person on the premises, to whom the notice should be read over and explained, and another copy had better be affixed on the outer door, or some conspicuous part of the premises; and thereupon, if it be made appear to the satisfaction of the court, that due diligence has been used (*p*), and that the tenant resides abroad, or has absconded, or kept out of the way to avoid being served, the court, on an affidavit of the facts, will grant a rule *nisi*, that the service on his relation or servant, or by posting, &c., shall be deemed good service, and direct in what manner the rule shall be served (*q*). Service on the wife of the son of

(*d*) *Anon.*, 2 Chit. Rep. 182: *Doe Osbal-
dston v. Roe*, 1 Dowl. 456: *Doe Cockburn
v. Roe*, Id. 692: *Doe Wetherell v. Roe*, 2 Id.
441.

(*e*) *Doe Trimmings v. Roe*, 6 Dowl. 765.
(*f*) *Anon.*, 2 Chit. Rep. 181: see *Doe
Walker v. Roe*, 2 C. & J. 381: and see
Doe v. Roe, 1 Dowl. 613, *cont.*

(*g*) *Doe v. Roe*, 2 Dowl. 184: see *Doe
Weatherall v. Roe*, 2 Dowl. 441.

(*h*) *Doe v. Roe*, 2 Dowl. 198.

(*i*) *Doe Messer v. Roe*, 5 Dowl. 716:
Doe v. Roe, 1 Dowl. 692: *Doe v. Roe*, 2 D.
& R. 12.

(*k*) *Doe Hartford v. Roe*, 1 Har. & W.
352.

(*l*) *Doe Emerson v. Roe*, 6 Dowl. 736.

(*m*) *Doe Robinson v. Roe*, 3 Dowl. 11.

(*n*) *Doe Treat v. Roe*, 4 Dowl. 278: *Doe
v. Roe*, 4 B. & Ald. 653: *Doe Potter v.
Roe*, 1 Hodg. 316: *Doe Robinson v. Roe*,
3 Dowl. 11: *Doe Harrison v. Roe*, 10 Price,
30: *Doe Mather v. Roe*, 5 Dowl. 552: see
Roe Fenwick v. Doe, 3 Moore, 576; 1 D.
& R. 514.

(*o*) *Doe Luff v. Roe*, 3 Dowl. 575.

(*p*) *Doe George v. Roe*, 3 Dowl. 9. In
this case service on the daughter was held
insufficient for a rule *nisi*, though it ap-
peared that the tenant's wife was keeping
out of the way to avoid being served.

(*q*) *Douglass v. —*, 1 Str. 575: Tidd,

the tenant on the premises was held sufficient where it appeared that the tenant was in America, and that his son managed his business. Where the service was effected at the house of the tenant in possession, by sticking a copy on the door of the house, and by serving another copy on a female there, who equivocated as to the tenant being at home, and, on the papers being explained, said she knew what they were, for that the lessor of the plaintiff had already been endeavouring to effect service, but could not; *Tindal*, C. J., observing, that he was inclined to think there was something like trickery, granted a rule *nisi*, which was afterwards made absolute on an affidavit that the same female was served with the rule in a yard attached to the tenant's house, and that she was his servant (*r*). Where the person effecting the service went to the house sought to be recovered, and, being informed that the tenant was at home, he put a ladder against the drawing-room window, and got up to it, and while there, believing that the tenant was in the room, he explained at the window the nature of the proceeding, and stuck a copy upon the door, it being sworn that the tenant was keeping out of the way to avoid being served, *Coleridge*, J., granted a rule *nisi* to be served personally, if possible, but if not, then in the same way as the copy of the declaration (*s*). So, where the clerk went to the tenant's house, knocked at the door, and received no answer, but heard some one whom he believed to be the tenant come to the door to listen, and he then read the declaration aloud, and explained it, and put a copy of it through a broken pane near the door, *Patteson*, J., granted a rule *nisi* (*t*). So, where several ineffectual attempts had been made to serve the tenant, who was denied by the servant, and the last time the servant stated that his master was in his house, but refused to be seen by any person, unless he sent in his name and message, whereupon the declaration was delivered to the servant, the court granted a rule *nisi* (*u*). And, in another case, where the servants refused to call their master or to receive the declaration, saying they had orders to take no papers, it was ordered (on motion) that leaving it at the house should be sufficient (*x*). So, where the tenant afterwards admitted that he was keeping out of the way to avoid being served, the court granted a rule *nisi* (*y*). But where the tenant's wife admitted that she had taken care to keep her husband out of the way, it was held that this admission of the wife could not be received against the husband, and the rule was refused (*z*). Merely stating the deponent's

9th ed. 1214: *Doe Mather v. Roe*, 5 Dowl. 552, and cases there cited: *Doe Osbaldiston v. Roe*, 1 Id. 456; *Doe Morpeth v. Roe*, 3 Id. 577; *Doe Latif v. Roe*, Id. 575. It may be generally stated, that wherever a *bonâ fide* attempt to effect regular service is frustrated by the fraud or artifice of the tenant, the court will grant a rule *nisi*. (See *Doe Frith v. Roe*, 3 Dowl. 569, and *per Tindal*, C. J., *Doe Wright v. Roe*, 6 Dowl. 455). Where the tenant went abroad, and resided there to avoid his creditors, and the declaration was delivered to a servant on the premises, who was left in charge of them, and another copy affixed on the outer door of the house, the Court of C. P. deemed it in-

sufficient. (*Roe Fenwick v. Doe*, 3 Moore, 576: *sed quare*).

(*r*) *Doe Wright v. Roe*, 6 Dowl. 455.

(*s*) *Doe Colson v. Roe*, 6 Dowl. 765: see *Doe Mortlake v. Roe*, 2 Dowl. 444; *Doe Turncroft v. Roe*, 1 H. & W. 371.

(*t*) *Doe Frost v. Roe*, 3 Dowl. 314; *Doe Wells v. Roe*, 3 Dowl. 582.

(*u*) *Doe Hervey v. Roe*, 2 Price, 112; *Doe Halsey v. Roe*, 1 Chit. Rep. 100, n.

(*a*): see *Doe Cockburn v. Roe*, 1 Dowl. 692.

(*x*) *Douglass v. —*, 1 Str. 575.

(*y*) *Anon.*, 2 Chit. 186.

(*z*) *Doe v. Smith*, 3 Dowl. 379: see *Doe Frazer v. Roe*, 5 Dowl. 720.

BOOK III.
PART I.

belief that the tenant keeps out of the way to avoid service is not sufficient (a).

It should be here observed, that where the premises are unoccupied, and the defendant has *abandoned* the possession, then the ejectment must be proceeded with as on a *vacant* possession; but not so where the tenant has *discontinued to occupy* the premises, and still retains the virtual possession of them (b). Also, if the premises be incapable of occupation, as if they be in an unfinished state, the ejectment must, perhaps, be proceeded with as on a vacant possession (c).

Service in case
of Lunacy.

Service in case of Lunacy.] Where the tenant in possession was a lunatic, and the declaration was served on a person who resided with her, and transacted her business, (no committee being appointed), the court granted a rule to shew cause why this should not be deemed good service (d). But, where the service was on the daughter of a lunatic tenant in possession, who carried on the business for him on the premises, and it appeared that he was confined in a lunatic asylum, *Patteson, J.*, refused a rule, observing, that the service might have been effected on the lunatic himself (e).

Service in case
of Bankruptcy.

Service in case of Bankruptcy.] Where the tenant in possession had become bankrupt, service of the declaration and notice addressed to the assignees upon a person who represented himself to be messenger in possession under the fiat, and on the official assignee, was held sufficient for a rule absolute (f).

Service on
Parish.

Service on Parish.] In ejectment for a house rented by a parish for the purpose of harbouring some of the parish poor, service on the churchwardens and overseers has been deemed sufficient (g). But the overseers cannot be treated as joint-tenants; and, in order to recover property in their possession, they must all be served (h).

Service on
Holders of
Chapel.

Service on Holders of Chapel.] In ejectments to recover possession of a chapel, the tenant in possession having quitted England, and not being likely to return, service having been effected on the clerk, who was intrusted with the keys, on the wife of the tenant, on his gardener, on a person, claiming as mortgagee, and by affixing a copy on the notice-board, the court granted a rule absolute for judgment against the casual ejector (i). And in another case, service on the surviving lessees and the sextoness was held sufficient (j). And service on the trustees of a dissenting meeting-house and at the house is sufficient for a rule *nisi*, and service of that rule on the trustees for a rule absolute (k).

Service on

Service on public Company, &c.] The service of the declaration

(a) *Doe Jones v. Roe*, 1 Chit. 213.

(b) See post, 770.

(c) *Doe Scovell v. Roe*, 3 Dowl. 691; 2 C., M. & R. 42, S. C., *nom. Showell*: and see *Doe v. Roe*, 4 Dowl. 173.

(d) *Doe v. Wright*, Barnes, 190: see *Doe Aylesbury v. Roe*, 2 Chit. Rep. 183; Loft, 401; *Goodtitle v. Badtitle*, 1 B. & P. 385.

(e) *Doe Brown v. Roe*, 6 Dowl. 270.

(f) *Doe Baring v. Roe*, 6 Dowl. 456.

(g) *Tupper v. Doe*, Barnes, 181.

(h) *Doe Weeks v. Roe*, 5 Dowl. 405.

(i) *Doe Dickens v. Roe*, 7 Dowl. 121.

(j) *Doe Kirschner v. Roe*, 7 Dowl. 97: and see *Anon.*, T. 1839, B. C.; 3 Jurist, 460.

(k) *Doe Gray v. Roe*, 7 Dowl. 700.

on the clerk of a public body (the clerk having been directed to be appointed by act of parliament) has been held sufficient to obtain a rule *nisi* why it should not be good service (*l*). And *Parke, J.*, in one case held that service on the bookkeeper of the Manchester Railway Company, on a part of the premises which he occupied, and where he slept, was sufficient for a rule absolute (*m*). And where the service was on the clerk of an incorporated company not empowered to sue or be sued in the name of their clerk, on part of the premises, though he did not reside there, *Coleridge, J.*, granted a rule *nisi* (*n*). And where the service had been made on the clerk of the company, and also on the secretary of the Exchequer loan commissioners, who were mortgagees in possession, *Littledale, J.*, granted a rule *nisi*, observing, that if the commissioners had no clerk, service on their secretary was sufficient (*o*).

CHAP. I.
SECT. 1.
public Com-
pany, &c.

4. Affidavit of Service.

Affidavit of Service. } After serving the declaration and notice, *engross an affidavit of the service on plain paper, and let it be sworn before a judge in town or a commissioner in the country* (*p*). It may, it seems, be made before the attorney in the cause (*q*), if he be not the attorney actually on the record (*r*). It may be made either by the person who actually served the declaration, or by one who was present at the time of the service (*s*). Where the ejectment is on several demises, the affidavit must be intitled "*Doe*, on the several demises of *A., B., C.*, [naming all], v. *Roe*" (*t*). But by mistake inverting the order of the lessors is of no consequence (*u*). Though the declaration describes the lessors in a particular character, as executors, assignees, &c., they need not be so described in the title of the affidavit (*x*); and where the declaration contains both joint and several demises, an affidavit intitled in the names of all the lessors severally is sufficient (*y*). It should not be intitled in the names of the real defendants (*z*). It must appear from the affidavit, that the declaration has been served on the "*tenant in possession*:" merely stating a service on the "*person*" in possession, or upon a person whom deponent believes to be tenant in possession, would be insufficient (*a*); stating that it was served on the tenant "*as executor*," would not suffice (*b*); nor would an affidavit that the service was on a tenant in "*legal*" possession (*c*); nor on the "*occupier*," the words "*tenant in possession*" being in ordinary cases indispensable (*d*). But where the premises were used as a gambling-house, and it was impossible to gain access or information, a rule *nisi* was granted on an affidavit

4. Affidavit of
Service.
Form of, &c.

(*l*) *Anon.*, 2 Chit. 181.

(*m*) *Doe v. Roe*, 1 Dowl. 23.

(*n*) *Doe Ross v. Roe*, 5 Dowl. 147.

(*o*) *Doe Marquis of Anglessey v. Roe*, M. 1838, 3 Jurist, 10.

(*p*) See the forms, Chit Forms, 362.

(*q*) *Doe Cooper v. Roe*, 2 Y. & J. 284.

(*r*) See R. H., 2 W. 4, r. 6, post: *Doe Grant v. Roe*, 5 Dowl. 409.

(*s*) *Goodtitle v. Badtittle*, 2 B. & P. 120.

(*t*) *Doe Cousins v. Roe*, 4 M. & W. 68;

7 Dowl. 53, S. C.

(*u*) *Doe v. Butcher*, 2 Chit. 174.

(*x*) *Doe Jenks v. Roe*, 2 Dowl. 55.

(*y*) *Doe Barles v. Roe*, 5 Dowl. 447.

(*z*) *Anon.*, 2 Chit. Rep. 181.

(*a*) *Tidd*, 1245: *Doe v. Roe*, 1 Chit.

Rep. 574: *Doe v. Badtittle*, 1 Chit. Rep. 215; Id. 505: *Doe Oldham v. Roe*, 4 Dowl. 714: *Doe Frazer v. Roe*, 5 Dowl. 720.

(*b*) *Doe v. Roe*, 2 C. & J. 45; 1 Dowl. 295, S. C. But in such cases, if the interest be in fact of a chattel nature, the affidavit may be in the common form, describing the executor (not in the representative character) as tenant in possession, notwithstanding he be not in the actual occupation of the premises. (See *Doe Rigley v. Roe*, 4 Dowl. 14).

(*c*) *Doe Osbaldiston v. Roe*, 30th April, 1832, Q. B.

(*d*) *Doe Jackson v. Roe*, 4 Dowl. 609; and see *Doe Jones v. Roe*, 5 Dowl. 226.

which stated service on the tenant in possession, as deponent believes (*e*). The affidavit must also be certain and positive: an affidavit of service on *J. S.* his tenant, or *C.* his wife, was holden bad (*f*): so was an affidavit of service on the wives of *A.* and *B.*, "who, or one of them, are tenants" (*g*); so was an affidavit of the service "on a woman on the premises, who represented herself to be the wife of the tenant in possession," without adding, that the deponent believed her to be his wife (*h*). So an affidavit, stating deponent to have "personally served *J. T.*, *W. E.*, *J. E.*, and *C. T.*, the four tenants in possession, with true copies of the declaration," is not sufficient, but each should be sworn to have been personally served (*i*). But an affidavit of service on the wife, "as she informed deponent, and as he verily believes," has been deemed sufficient (*j*). An affidavit of service on the wife of the tenant, which does not shew that it was made on the premises, must shew that she was living with her husband (*k*). But an affidavit of service on her "near the premises" has been held sufficient to obtain a rule *nisi* (*l*). It must appear from the affidavit, that the notice was read over or explained to the party on whom it was served, or that he understood its import or contents (*m*). If the affidavit states that the tenant has since acknowledged that he understood the meaning and intention of the service, it will suffice, without any statement of the reading or explanation (*n*). Where the service is made upon a servant or other third person, the affidavit must shew that the tenant (*o*) has acknowledged that he has received the declaration, or that he has known of the service thereof, previous to the first day of the term (*p*): the affidavit must shew *when* such acknowledgment was made (*q*). Even a rule *nisi* will not be granted, unless the affidavit shew some probable grounds for believing that the tenant has received the declaration before the term (*r*), or that the servant has authority to receive letters and papers for the tenant (*s*). An acknowledgment *within* the term is sufficient, if it appear that declaration was received before the term (*t*). If no one be in the house or premises, and the declaration is stuck up thereon, the affidavit must state the deponent's belief that the tenant absconded to avoid the service (*u*); it must also state that a copy of the declaration was left, as well as affixed on the premises, and that the deponent, or others, had used diligent means to discover the tenant's residence, which is still unknown (*x*); it is not sufficient to state that the lessor of

(*e*) *Doe George v. Roe*, 3 Dowl. 22: see *Doe Hunter v. Roe*, 5 Dowl. 553.

(*f*) *Birbeck v. Hughes*, Barnes, 173.

(*g*) *Harding v. Greensmith*, Barnes, 174.

(*h*) *Doe Simmons v. Roe*, 1 Chit. Rep. 228: *Doe Walker v. Roe*, 4 Moo. & P. 11: *Doe Smith v. Roe*, 1 Dowl. 614.

(*i*) *Doe Levi v. Roe*, 7 Dowl. 102.

(*j*) *Doe Deily v. Roe*, Barnes, 194: see *Doe Jenks v. Roe*, 5 Dowl. 155.

(*k*) *Doe Briggs v. Roe*, 1 Dowl. 312; 2 C. & J. 202, S. C.: *Doe Mingay v. Roe*, 6 Dowl. 182.

(*l*) *Doe Marquis of Bath v. Roe*, 7 Dowl. 692.

(*m*) See *ante*, 737: *Doe v. Roe*, 1 Dowl. 428: *Doe Jones v. Roe*, Id. 518.

(*n*) *Doe Thompson v. Roe*, 2 Chit. Rep. 186: *Anon*, Id. 184: *Doe Quintin v. Roe*,

Ad. Eject. 215.

(*o*) An acknowledgment by his wife will not do (*ante*, 739).

(*p*) *Doe Wilson v. Roe*, Ad. Eject. 209: *Doe Tindale v. Roe*, 2 Chit. Rep. 180: *Doe Martin v. Roe*, 1 H. & W. 46: *ante*, 739.

(*q*) *Anon.*, 2 Chit. Rep. 187.

(*r*) *Doe Read v. Roe*, 5 Dowl. 85.

(*s*) *Doe Read v. Roe*, 1 M. & W. 633.

(*t*) *Ante*, 739. Therefore, *quare*, why necessary to state the time of acknowledgment?

(*u*) *Doe Lowe v. Roe*, 1 Chit. Rep. 505, n.; 2 Chit. Rep. 177; Harrison, L. & T. 833: see *ante*, 740.

(*x*) *Doe Tarluy v. Roe*, 1 Chit. Rep. 506, 505 n.: *Anon.*, 2 Chit. 177: *ante*, 740, 741.

the plaintiff had been unsuccessful in two attempts to find the defendant at his dwelling-house, and had therefore stuck up the declaration on the premises (*y*).

When several tenants had been served with copies of the same declaration, if it is meant but as *one* ejectment, and to be followed by one judgment, one affidavit of the service of all is sufficient, annexed to the copy of one declaration, if all the copies are alike, or to several copies if all are not alike: if the ejectments are made *several*, so as to have several judgments, writs of possession, &c., then an affidavit of the service must be annexed to separate copies of the declaration (*z*).

Where the service is good, but the affidavit defective, the defect may, in general, be remedied by a supplemental affidavit (*a*).

CHAP. I.
SECT. I.

Where there are several Tenants in Possession.

Supplemental Affidavit.

5. Judgment against the casual Ejector.

The Motion and Rule for.] If the tenant, upon whom the declaration and notice were served, does not take steps to have himself made a party to the action, (that is, unless he, in due time, enter into the common consent-rule to confess lease, entry, ouster, and possession), the plaintiff becomes entitled to judgment by default against the casual ejector. The motion for this judgment should be made some time in the term in which the tenant was required by the notice to appear (*b*); in town causes it is usually made at the beginning of the term; in country causes, usually at the latter end of it (*c*). In a town cause, it is in the Queen's Bench and Exchequer requisite that this motion should be made in the term, and if not applied for till a subsequent term, it will be refused, and a fresh ejectment would have to be served (*d*). In country causes, in all the courts, and in town causes in the Common Pleas (*e*), it may be made in the subsequent term; and, in the Queen's Bench, the rule is absolute in the first instance (*f*); but in the Common Pleas and Exchequer a rule *nisi* only will be granted if the motion be not made till the subsequent term (*g*). The motion cannot, either in town or country causes, be made after the expiration of two terms after the service of the declaration (*h*). If the ejectment be by a *landlord*, under the provisions of the 11 G. 4 & 1 W. 4, c. 70, s. 36, see the directions, *post*, 783. As to the time in which the tenant or landlord must appear and plead, see *post*, 749.

5. Judgment against the casual Ejector.

The Motion and Rule for.

When made.

In order to move for judgment against the casual ejector, annex the above-mentioned affidavit of service to the declaration, and indorse on them—"To move for judgment against the casual

Practical Directions as to the Motion and Rule.

(*y*) Harrison, L. & T. 833.

(*z*) 2 Sell. Pract. 178.

(*a*) 2 Sellon, 99: Tidd, 1216.

(*b*) *Fenwick's Case*, 1 Salk. 275; 2 Ken. 272: R. T., 18 C. 2 (*a*): R. E., 2 G. 4; 4 B. & Ald. 539. By the recent rule of H. T. 1838, of the Court of C. P., it is ordered, "that on and after the first day of next Easter term, every motion for judgment against the casual ejector in ejectment, in London and Middlesex, may be made on any day during the term."

(*c*) See the rule at end of note (*b*), *supra*:

R. T., 32 Car. 2: *Doe Langford v. Roe*, 1 Bing. N. C. 161: *Doe Glyn v. Roe*, 2 Dowl. 822.

(*d*) *Doe Greaves v. Roe*, 4 Dowl. 88, per Coleridge, J.: *Doe Wilson v. Roe*, 4 Dowl. 124.

(*e*) *Doe Wilson v. Roe*, 4 Dowl. 124.

(*f*) *Doe Croome v. Roe*, 6 Dowl. 270: *Doe v. Roe*, 2 Dowl. 196: *Doe Wiggs v. Roe*, 5 Dowl. 662.

(*g*) *Doe Reeve v. Roe*, 1 Gale, 15: *Right d. Jeffery v. Wrong*, 2 Dowl. 348, Exch.: *Doe Wilson v. Roe*, 4 Dowl. 124, C. P.

(*h*) *Doe v. Roe*, 1 Dowl. 495; 2 Id. 196.

ejector ;" get it signed by counsel. The motion paper requires only counsel's signature, if the declaration have been regularly and perfectly served on the tenant or his wife, and should be at once taken to the rule office without applying to the court (i); but if the service were in any other manner, the motion must be made in court, and the particular manner of the service mentioned (k). Take the motion paper to one of the masters, and draw up the rule. This is a rule nisi for judgment unless the tenant shall appear and plead within the time therein mentioned (l). This rule is not served on the tenant in possession, nor has he any actual notice thereof; and his attorney, therefore, must search for the rule; and, at all events, appear and plead before the expiration of the time thereby limited, or judgment may be signed against the casual ejector. But we have seen that in some cases the court will grant a rule nisi only in the first instance (m). In such cases the service should be made in the best manner and as long before the term as possible. Then move the court, upon affidavit of the facts, for a rule to shew cause why the service in question should not be deemed good service, and that leaving a copy of the rule with some person on the premises, or affixing it upon the outer door, if no person can be met with, shall be deemed good service of the rule (n). Draw it up with one of the masters, and serve a copy of it in the manner directed by the rule; and if no sufficient cause be afterwards shewn, the court will make the rule absolute upon an affidavit of service and compliance with the terms of the rule (o). The rule nisi need not be directed to any particular person (p). If there be but one ejection, one rule is sufficient, although there are several tenants, and although the name of each tenant was separately prefixed to the notice served on him, instead of the names of all (q). This rule must be drawn up and taken from the master's office, within two days after the end of the term in which it was moved for; otherwise it shall not be drawn up or entered, nor shall any further proceedings be had in such ejection (r).

Judgment,
when and
how Signed.

When and how Signed.] At the expiration of the time limited for the tenant's appearance (s), if no plea and consent rule on the part of the tenant have been delivered, then make an incipitur on plain paper, and an incipitur on the roll, and upon producing your rule for judgment, the master will sign judgment. It seems that in the Queen's Bench, by bill, it is necessary to enter a common appearance for the casual ejector, previously to signing this judgment (t); but in the Queen's Bench, by original, or in the Common Pleas and Exchequer, it is not necessary, and the costs of it would be disallowed (u). There

(i) *Doe Welchon v. Roe*, 5 Dowl. 271.

(k) See ante, 736, 743.

(l) See the form as to the whole of the premises, Chit. Forms, 366; the like as to part, ib.; the like where there are several tenants, ib.

(m) Chit. Sum. Pract. 219.

(n) See the form of the rule, Chit. Forms, 365.

(o) See form of affidavit, Chit. Forms, 365. See *Douglass v. —*, 1 Str. 575; *Fenn v. Denn*, 2 Burr. 1181; *Methold v. Norright*, 1 W. Bl. 290; *Gulliver v. Wag-*

staff, Id. 317; *Fenn v. Roe*, 1 New Rep. 293; Ch. Sum. Pr. 220.

(p) *Doe Aylesbury v. Roe*, 2 Chit. Rep. 183.

(q) *Doe Buriton v. Roe*, 7 T. R. 477; *Doe Pearson v. Roe*, 5 Moore, 73; *Doe v. Rowe*, 2 C. & J. 670; ante, 734, 735.

(r) R. M., 31 G. 3, r. 1, K. B.: R. E., 48 G. 3, C. P.: 4 T. R. 1.

(s) Vide post, 749.

(t) Tidd, 9th ed. 1244; R. T., 14 C. 2, r. 1; R. M., 33 C. 2: 2 Sellon, 100.

(u) *Doe Morgan v. Roe*, 2 M. & W. 423.

is no occasion for a rule to plead (*x*), nor for a demand of plea. Judgment must not be signed before the afternoon of the day after that when the rule for judgment expired; and if Sunday be the last day, the plaintiff must wait till the afternoon of Tuesday (*y*). There is no distinction, in point of effect, between this judgment and a judgment obtained upon a verdict against the tenant or other person claiming title. It should seem, that unless a rule for judgment has been duly entered or given, the defendant may appear and plead at any time before judgment has been signed against the casual ejector (*z*).

Execution on.] When judgment against the casual ejector has been signed, *enroll a writ of possession on parchment* (*a*), *take the judgment paper and writ to the sealer of the writs* (*b*), *who will seal it. Take the writ to the sheriff's office, and get a warrant on it; and give the warrant to an officer to execute.* As to the execution of this writ, *vide post*, 767.

Setting aside Judgment by Default, &c.] At any time before the writ of possession is executed, the court or a judge in vacation, upon an affidavit of merits, or that the defendant believes there is a good defence, may set aside or stay the proceedings on payment of costs, and let in the tenant or other person claiming title to defend the action, by obliging the plaintiff to accept a plea (*c*); but the court will not, in general, grant this indulgence to parties, after execution executed (*d*),

Setting aside Judgment by Default, &c.

In general.

(*x*) Ad. Eject. 2nd ed. 222.
(*y*) *Doe v. Hedges*, 4 D. & R. 393; and see *Hyde v. Thrustout*, Say. r. 303.

(*z*) Chit. Sum. Prac. 221: *ante*, Vol. I. 165.

(*a*) See the form, Chit. Forms, 368.

(*b*) It is in contemplation to abolish this office.

(*c*) *Anon.*, 2 Salk. 516: *Dobbs v. Passer*, 2 Str. 975; *Doe Troughton v. Roe*, 4 Burr. 1996.

(*d*) *Doe Ledger v. Roe*, 3 Taunt. 506: *Goodtitle v. Badtitle*, 4 Taunt. 820: *Doe Thompson v. Roe*, 4 Dowl. 117. But in the first of these cases, the landlord was guilty of negligence in not instructing his attorney. In the second there must have been laches, for the lessor of the plaintiff had sold and transferred possession of part of the premises previously to the application; and the principle there acted on—if your tenant has done you wrong, that is only a matter between him and you—appears untenable. (See *per cur.* 4 Burr. 1996, cited *infra*.) The last case (in which the Court of C. P. refused to let in a person claiming to be landlord to defend after judgment and execution, there being no collusion suggested between lessor of the plaintiff and the tenant) was decided on the authority of the two former, and the affidavit on which the person claiming to be landlord applied was weak and inexplicit, not stating how or when he became landlord, nor shewing any of the usual claims to indulgence. Mr. Serjeant Adams says, that, as the situations of claimant and defendant in ejectment are materially different, the courts are liberal in their rules for setting aside judgment against the casual ejector, though regularly signed, and will grant

them even after writ of execution executed, upon affidavit of merits or other circumstances which, in their discretion, they may deem sufficient; and he cites *Dobbs v. Passer*, 2 Str. 975 (where the court observed, that great inconveniences might arise from changing the possession, timber might be felled, &c.); *Mason v. Hodgson*, Barnes, 250 (in which case the appearance was entered by mistake in a wrong term, and judgment regularly signed, but “as the title had not been tried,” judgment was set aside on payment of costs, entering an appearance as of the proper term, and entering into the common rule by consent); *Doe Grocers' Company v. Roe*, 5 Taunt. 205 (which was a case of collusion, and the court said, that there was no general rule which prevented them from setting aside a writ of possession after execution had). And see *Doe Troughton v. Roe*, (4 Burr. 1996), where the court were clearly of opinion, that the possession ought not to be changed by judgment in ejectment where there had been no trial or opportunity of trying, although the obtaining the judgment might be owing to the default or treachery of the defendant's own tenant. (See also *Doe Shaw v. Roe*, 13 Price, 260: *Doe Ingram v. Roe*, 11 Id. 507: *Doe Meyrick v. Roe*, 2 C. & J. 682). From these cases it may be collected, that wherever judgment has been signed and writ of execution executed without a trial or an opportunity of trying; either by collusion between the lessor of the plaintiff and the tenant of the applicant; default or evident treachery of the tenant; (4 Burr. 1996; 2 C. & J. 682: but see 4 Taunt. 820); mere slip or accidental laches of applicant's attorney; or error in matter of

or, as it seems, after a trial has been lost (*e*). Where the landlord, after notice to quit, brought an ejectment against the tenant, and obtained a verdict, and the latter still continuing in possession, he distrained on him for rent, which became due after the verdict, and which he paid, it was held, that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress (*f*). The Court of Exchequer, however, set aside a regular judgment and writ of possession executed, on an affidavit by the attorney for the landlord and tenant, that he had received instructions for entering an appearance, but had neglected it, owing to matters personally affecting himself, which had prevented his attending to it (*g*). In another case, a judgment against the casual ejector was set aside after execution executed, on the ground that there had been no notice given to the landlord by the tenant in possession of the premises, and consequently no trial of the merits; and the terms made were, that the landlord should pay costs to the lessor of the plaintiff, and that the possession should be, in the meantime, retained by the latter (*h*). And in cases of collusion, the court will always thus interfere (*i*). If the court or judge will not interfere, then the landlord's or tenant's remedy is to bring an ejectment and try his right (*k*).

When Signed
too soon.

If judgment by default be signed sooner than the practice of the court warrants, it will be set aside on application. Thus where a rule was obtained for judgment against the casual ejector, unless the tenant should appear and plead, and the

form;—(under this head may be classed the cases where judgment signed on account of insufficiency in the consent rule has been set aside for the purpose of amending and obtaining a trial, as in *Doe v. Anderson*, 4 Dowl. 707, where the consent rule was for a certain "tin-bound," setting out the abutments, when it ought to have been for the mine under the "tin-bound");—provided there has been no negligence in instructing counsel, &c., before judgment signed, nor laches after it has been signed, and that the applicant's title is explicitly stated on affidavit, there can be little doubt that the court or a judge will set aside the judgment on the condition of paying costs, &c., in order to obtain a trial on the merits. Indeed, were this not the case, the landlord would suffer all the disadvantage arising from the want of that notice which would be required in a form of action more strictly legal, without deriving any benefit from the equitable discretion which courts of law have always been inclined to exercise in the action of ejectment. A late case (*Doe Stokes v. Roe, cor. Vaughan, J.*, at chambers, 14th December, A. D. 1836, MSS.) will serve as an illustration. On November 1, the declaration was served on the tenant, who neglected to deliver it to his landlord till November 19. The landlord on receiving the declaration sent it by a third person to his attorney, with directions to take the necessary steps. Owing to some mistake in the message, the attorney, being particularly engaged, and expecting further instructions, did not examine the papers for more than a week,

when, to his surprise, finding that an appearance was to be entered in Michaelmas term, then nearly elapsed, he applied to his client, and received instructions to appear for him immediately, but it was too late, judgment having been regularly signed against the casual ejector. On an affidavit by the landlord and the attorney, stating the circumstances, and their belief that the landlord had a good defence, and shewing how and when he became landlord, notwithstanding an affidavit by the lessor of the plaintiff, claiming as heir-at-law of the same person through whom the landlord claimed, (but not explicit), judgment and writ of possession executed were set aside, and the landlord let in to defend, on payment of costs. To take advantage of such an order, obtain a rule directing the lessor of the plaintiff to restore possession, and in case of a refusal apply for an attachment for the contempt. (2 Salk. 588, *per Holt, C. J.*: *Davies v. Povey*, 2 W. Bl. 892.) As to the mode of proceeding, where the lessor of the plaintiff cannot be served with this rule, see *post*, 768.

(*e*) 2 Sellon, 178.

(*f*) *Doe Holmes v. Davies*, 2 Moore, 581.

(*g*) *Doe Shaw v. Roe*, 13 Price, 260.

(*h*) *Doe Ingram v. Roe*, 11 Price, 507: *post*, 749. 753: see *Doe Meyrick v. Roe*, 2 C. & J. 682: the case was not sufficiently strong to authorize an order for restitution.

(*i*) See *Doe Grocers' Company, v. Roe*, 5 Taunt. 205: *Goodtitle v. Badtitle*, 4 Taunt. 820.

(*k*) See 2 Sellon, 230: *Harr. L. & T.* 780.

tenant did not appear, but a judge's order was obtained for a delivery of particulars to defendant, and a further order by consent that defendant should have ten days' time to plead after delivery, pleading issuably, rejoining gratis, and taking short notice of trial, and the lessor of the plaintiff, after having taken no step for a year, delivered particulars, and at the expiration of the ten days signed judgment against the casual ejector, without giving a term's notice, the judgment was set aside as irregular, but without costs, as the defendant was a nominal party (*l*).

CHAP. I.
SECT. 1.

6. The Appearance and Pleadings.

Appearance and Plea by Tenant.] The appearance is entered and plea delivered, either by the tenant upon whom the declaration and notice was served, or by his landlord, or by both jointly, or by some other person claiming title to the premises.

6. Appearance and Plea.
By Tenant.

In *town causes*, where the notice requires the tenant to appear on the first day of the term, he is allowed four days, after the rule for judgment already mentioned has been drawn up and entered, to appear and plead, provided the rule be drawn up and entered before the last four days of the term, or if drawn up and entered within the last four days of the term, he has until two days before the *essoign-day* (*m*) of the following term allowed him. But if the notice were to appear generally of the term, he shall have the entire of the term to appear and plead. In *country causes*, the tenant, &c., had formerly until four days exclusive after the issuable term previous to the assizes allowed him for the same purpose (*n*); but now, by *R. E.*, 1821 (*o*), in the Queen's Bench and Common Pleas, in country ejectments, where the declaration is served before the first (*p*) day of Michaelmas or Easter term, the time for the appearance of the tenant shall be within four days after the end of such term respectively: and the same, of course, as to Hilary and Trinity terms. But it seems that in the Exchequer he would still have until four days after the issuable term (*q*).

Time for Entering.

It should be remarked, that a tenant is not bound to appear, even although his landlord offer to indemnify him (*r*); nor can the landlord appear and defend the ejectment in the tenant's name, without his consent (*s*); and if he do, the appearance and plea would be irregular, and the court would order it to be withdrawn (*t*). On the other hand, if the ejectment be brought by the landlord, or any other person claiming under him, the court will not, it is said, let the tenant in to defend the action on any supposed defect of title (*u*). The landlord, however, may have leave to appear and defend the action in his own name, as shall be stated presently; and for this purpose the tenant, when served with a declaration in ejectment, is bound to give immediate notice thereof to his

Tenant not bound to appear.

Tenant should give Landlord Notice of the Ejectment.

(*l*) *Doe Vernon v. Roe*, 7 Ad. & E. 14; 2 Nev. & P. 237.

(*m*) *Quære* as to the *essoign day*: see *ante*, 786.

(*n*) See *Hyde d. Culliford v. Thrustout*, Say. 303; Barnes, 186: *Mason d. Kendale v. Hodgson*, Id. 256.

(*o*) 4 B. & Ald. 539; 5 Moore, 637.

(*p*) R. T., 1 W. 4. *ante*, 736.

(*q*) R. H., 39 G. 3, Exch.

(*r*) *Right v. Wrong*, Barnes, 173.

(*s*) *Roe Jones v. Doe*, Barnes, 178.

(*t*) 2 Sellon, 179.

(*u*) *Driver v. Laurence*, 2 W. Bl. 1259.

BOOK III.
PART I.

landlord, under pain of forfeiting three years' improved rent of the premises (*x*). Where the tenant had not given notice to the landlord of the ejectment, and there was judgment against the casual ejector, the court set aside the judgment, and ordered the tenant to pay all the costs to the lessor of the plaintiff on the landlord's entering into the usual rule to try the title (*y*).

The Appearance, how entered, &c.

The mode of appearing for the tenant is thus :—*Get a blank consent rule, and fill it up* (*z*). *If the ejectment be upon a supposed original, strike out the words "and file common bail," in the printed form of the consent rule, and instead of the word "bill," insert "writ."* *Let the defendant's attorney sign the rule, leaving room above his signature for that of the attorney for the plaintiff.* Then, if the ejectment be by original, make out a praecipe for the appearance (*a*); and take it to one of the masters, who will thereupon enter an appearance for the tenant. Or if the ejectment be by bill, get a common bail-piece at the stationer's; fill it up (*b*), and take it, together with the consent rule, to one of the masters, who will number (*c*) and file the bail-piece for the tenant. The master will at the same time mark the consent rule.

The Plea how delivered.

Next, whether the ejectment be by original or by bill, engross the general issue upon plain paper; annex the rule to it, and deliver both to the plaintiff's attorney or agent (*d*). By rule of *H. T.*, 1 *Vict.* (Q. B.), after reciting, that "by the practice of this court, in all actions of ejectment, it is necessary that the plea and consent rule should be filed at the chambers of one of the judges of the same court, it is hereby ordered, That from and after the last day of this present term, the said practice be discontinued, and in all such actions, the plea, with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer, as heretofore" (*e*).

Form of the Plea, and Time to plead.

According to the usual terms of the consent rule, the defendant can plead the general issue only; but the court, upon application, may give him leave to plead to the jurisdiction (*f*), such as a plea of ancient demesne or the like (*g*). It is necessary to remark, that the plea of ancient demesne in ejectment must be pleaded within four days, or within the first four days of the term (*h*), although that happen to be before the expiration of the time limited for the tenant's appearance. The court have allowed it to be filed *de bene esse*, within the first four days of the term, pending a rule *nisi* for permission to allow the plea to be pleaded (*i*). A plea *puis darrein continuance*, of a release by one of the lessors of the plaintiff, is bad on

(*x*) 11 G. 2, c. 19, s. 12: see *Buckley v. Buckley*, 1 T. R. 647; *Crocker v. Fothergill*, 2 B. & Ald. 652.

(*y*) *Doe Troughton v. Roe*, 4 Burr. 1996; *Doe Meyrick v. Roe*, 2 C. & J. 682: see ante, 748.

(*z*) See the form, Chit. Forms, 369.

(*a*) See the form, Chit. Forms, 367, 371.

(*b*) See the form, Chit. Forms, 371.

(*c*) R. E., 33 G. 3.

(*d*) See the form of plea, Chit. Forms, 371.

(*e*) The rule of *H. T.*, 4 W. 4, r. 1, that no plea, &c., shall be filed, but shall be delivered, was held not to apply to pro-

ceedings in ejectment. (See *Doe Williams v. Williams*, 2 A. & E. 381; 4 Nev. & M. 295, S. C.) In the C. P. it was the practice, before this rule, to file the plea and consent rule at the prothonotary's; and, in the Exchequer, to file them with the clerk of the pleas.

(*f*) Ante, 653.

(*g*) See as to the affidavit necessary to support an application for leave to plead this plea of ancient demesne, *Doe Rust v. Roe*, 2 Burr. 1046.

(*h*) *Denn Wroot v. Fenn*, 8 T. R. 474: see ante, 653.

(*i*) *Doe Morton v. Roe*, 10 East, 523.

demurrer(*k*). If the plaintiff after issue, and before trial, enter into part of the premises, the defendant might plead it as a plea *puis darrein continuance*, as in other cases(*l*). Where the name of the plaintiff's lessor was inserted in the body of the plea (as the person complaining) instead of that of the nominal plaintiff, judgment signed against the casual ejector, under the idea that the plea was null and void, was set aside with costs, as irregular(*m*). The defendant may obtain time to plead, as in other cases(*n*).

Let the plaintiff's attorney or agent, when the plea and consent rule have been delivered, separate the plea from the rule, and sign the latter, and take it to one of the masters, who will thereupon draw up the rule(*o*). When you have got the rule from the master, make up the issue, as directed post, 756(*p*); annex a copy of the rule to it, and deliver it to the defendant's attorney or agent.

Consent Rule, when and how drawn up.

If the plaintiff delay drawing up the rule or replying, the defendant may rule him to reply; and if he do not reply within the time limited by the rule, which is four days, the defendant may sign judgment of *nonpros* (*q*). The defendant, however, in such a case, where the lessor of the plaintiff has never entered into the consent rule, will not be entitled to costs (*q*), the plaintiff being a mere nominal adversary. But he will be entitled to costs on a *nonpros*, for not replying when the lessor of the plaintiff has joined in the consent rule.

Nonpros for not drawing up the Consent Rule.

By *R. M.*, 1820, Q. B. (*r*), *R. II.*, 1 & 2 G. 4, C. P. (*s*), *R. E.*, 2 G. 4, Exch. (*t*), the defendant shall specify in the consent rule for what premises he intends to defend, and shall therein consent to confess upon the trial, not only lease, entry, and ouster, but that he (if he defend as tenant, or if he defend as landlord, then that his tenant) was at the time of the service of the declaration in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the defendant, then no costs shall be allowed for not further prosecuting the same, but the defendant shall pay costs to the plaintiff; in such case to be taxed. Notwithstanding the first part of this rule, it appears to be the inveterate practice to state the premises for which the tenant (or landlord) means to defend with the same obscure generality as in the declaration(*u*). The consent rule need not set out the christian and surname of the lessor of the plaintiff(*v*). It must, however, be correctly intitled in the action; and where four ejectments were brought on the demise of the same lessor, to recover thirteen houses, each ejectment being for a portion of the thirteen, and each declaration was for thirty messuages,

Form of the Consent Rule.

(*k*) *Doe Byne v. Brewer*, 4 M. & Sel. Bl. 763; *Doe Vernon v. Roe*, 7 Ad. & El. 300; 2 Chit. Rep. 323, S. C.
(*l*) 2 Sel. 192; ante, Vol. I. 300.
(*m*) 2 Sel. 188.
(*n*) See Vol. I. p. 160.
(*o*) See the form, Chit. Forms, 369.
(*p*) See Chit. Forms, 378, 379.
(*q*) *Goodright Ward v. Badtitle*, 2 W. Bl. 14; 2 Nev. & P. 237, S. C.
(*r*) 2 Chit. Rep. 375, 379.
(*s*) 5 Moore, 310.
(*t*) 9 Price, 299.
(*u*) 4 Nev. & M. 45, n. (*a*): see *Doe v. Hughes*, 4 Dowl. 412.
(*v*) *Doe Spencer v. Reid*, 3 Moore, 96.

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and the landlord entered into a consent rule, treating the four actions as one, but brought on several demises, and for a hundred and twenty messuages, it was held that the consent rule was a nullity, and that a writ of error *coram nobis*, describing the cause in the same manner, was no stay of execution (*x*). Where the ejectment has been brought by one tenant in common against another (*y*), or by one coparcener or joint tenant against another (*z*), the court or a judge, upon application, will let in the tenant, &c., to defend, upon his confessing lease and entry only, so as to put the lessor of the plaintiff to prove at the trial an actual ouster; provided the tenant do not dispute the plaintiff's title as joint tenant, &c. (*a*). If the tenant defend only for part, the plaintiff may, of course, sign judgment against the casual ejector for the residue.

Appearance
and Plea, &c.,
by Landlord,
&c.

Appearance and Plea, &c., by Landlord, &c.] We have already seen, (*ante*, 749), that, although the tenant in possession is not bound to appear and defend the action, yet he is obliged, under a penalty, to give his landlord notice, when a declaration in ejectment has been served on him. And by 11 G. 2, c. 19, s. 13, the court may allow the landlord to make himself defendant by joining with the tenant, if the tenant appear; but if the tenant neglect or refuse to appear, judgment shall be signed against the casual ejector for want of such appearance; yet, if the landlord shall desire to appear by himself, and consent to enter into the like rule the tenant must have entered into had he appeared, the court shall permit him to do so; and shall order a stay of execution upon the judgment against the casual ejector, until they shall make further order therein. A liberal construction has been given to this statute; and the court have let in the heir of the landlord, although he had never been in possession (*b*), a remainder-man under the same title with the original landlord (*c*), a devisee in trust (*d*), and a mortgagee (*e*), severally, to defend the action. And where a lord, claiming by escheat, applied to be admitted a defendant in an action brought by one claiming as heir, the court directed the lord to bring an ejectment, and the heir to be admitted to defend; and said, that if the lord refused, they would discharge his rule to be admitted; or, if the heir refused, they would allow the lord to defend (*f*). But a mortgagee will not be permitted to come in, and defend as landlord, unless he be interested in the result of the suit, and be not put forward merely to further the purposes of the tenant (*g*). Where the tenant came into possession under an agreement with the lessor of plaintiff for a term of years, but afterwards disclaimed the tenancy, the court held that a stranger, claiming a title, should not be

(*x*) *Doe Faithful v. Roe*, 7 Dowl. 718.

(*y*) *Oates v. Brydon*, 3 Burr. 1895. But the tenant of tenant in common is not entitled to this privilege. (*Doe Wills v. Roe*, 4 Dowl. 628).

(*z*) *Doe Ginger v. Roe*, 2 Taunt. 397: and see *Doe White v. Cuff*, 1 Camp. 173: *Rosc. on Evid.* 2nd ed. 32.

(*a*) *Anon.*, 7 Mod. 39.

(*b*) *Lovelock v. Doncaster*, 4 T. R. 122:

and see 3 T. R. 783, S. C.

(*c*) *Lovelock v. Doncaster*, 3 T. R. 783.

(*d*) 4 Id. 122: see *Roe Leek v. Doe*, Barnes, 193.

(*e*) *Doe Tilyard v. Cooper*, 8 T. R. 645:

Doe Tubb v. Roe, 4 Taunt. 887.

(*f*) *Fairclain v. Shantitle*, 3 Burr. 1290.

(*g*) *Doe Pearson v. Roe*, 6 Bing. 613; 4 Moo. & P. 437, S. C.

admitted to defend; or that, if he happened to be admitted, he should not be allowed to impeach the title of the lessor of the plaintiff; or to set up any other defence than that of which the tenant might have availed himself had he appeared (*h*). And where, upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person, having an adverse title, entered into a consent rule to defend as landlord, the court discharged such rule, with costs (*i*).

The court have, in some instances, even after judgment against the casual ejector, let the landlord in to defend the action (*k*).

Where a party is landlord of the whole, and tenant of part of the premises, and the tenants are paupers, if he alone be the real party defending, he should appear, and defend as landlord for the premises in the possession of his tenants and as tenant for the residue; or, in default thereof, a rule or order may be obtained for setting aside the appearances and pleas of the tenants, and judgment may be signed against the casual ejector (*l*).

Where the
Tenants are
Paupers.

A party residing abroad may, upon being admitted to defend as landlord, be required to give security for costs (*m*).

Security for
the Costs.

The motion for the landlord to be admitted to defend, either with the tenant, or by himself, is a motion of course, and requires only counsel's signature. *Get the motion paper signed by counsel, take it to one of the masters, and draw up the rule (n); and annex a copy of it to the consent rule and plea, before you deliver them to the plaintiff's attorney or agent.*

The Motion
and Rule for
leave to de-
fend as Land-
lord.

You then proceed as in ordinary cases, where the tenant appears alone (o). If the landlord appear by himself, the rule gives liberty to the plaintiff to sign judgment against the casual ejector, but execution thereon to be stayed until further order (*p*). The plaintiff, thereupon, immediately signs judgment against the casual ejector; and if the landlord does not appear at the trial, the plaintiff, upon producing the *postea* and office copies of the rules, must move for leave to sue out execution, and the court will accordingly grant a rule *visi* (*q*). But if the landlord does appear, and the cause be tried, and a verdict and judgment be obtained against him, execution may be issued against him without any further order of the court (*r*).

Where the landlord was admitted to defend alone, and died before the termination of the action, having devised all his estates to B., and the Statute of Limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector

Effect of
Death, pend-
ing the Suit.

(*h*) *Doe Knight v. Smythe*, 4 M. & Sel. 347. And, according to *Doe v. Creed*, (5 Bing. 327), the landlord cannot avail himself of every defence that the tenant could have done had he defended; for it was there considered, that, where a party defends as landlord, and the occupiers have suffered a judgment by default, he cannot object that the occupiers have not received notice to quit from the lessors of the plaintiff. (And see *Doe v. Street*, 4 Nev. & M. 42; *Doe v. Horn*, 3 M. & W. 340.)

(*i*) *Doe Horton v. Rhys*, 2 Y. & J. 88.

(*k*) See *ante*, 747.

(*l*) *Thrustout v. Shenton*, 10 B. & C.

111; 5 Man. & R. 543: *post*, 762, 763.

(*m*) *Doe Hudson v. Jameson*, 4 M. & Ry. 570.

(*n*) See the form, Chit. Forms, 370.

(*o*) See *ante*, 750.

(*p*) See the form of the rule, Chit. Forms, 370; see *Doe v. Bennett*, 4 B. & C. 897; 7 D. & R. 261, S. C.; *Doe Roberts*

(*q*) See the form of the rule, Chit. Forms, 385.

(*r*) See *Doe Lucy v. Bennett*, 4 B. & C. 897; 7 D. & R. 261, S. C.; *Doe Roberts v. Gibbs*, 1 Chit. Rep. 47; *Doe Simons v. Masters*, Id. 233: *post*, 766.

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and issue execution thereon, unless B. would appear and defend the action as landlord(s).

Cognovit.

Cognovit(t).] The defendant, after entering into the consent rule, may, if he wish, withdraw his plea and confess the action(u). The plaintiff, in such a case, after a *relictâ verificatione* entered, may sign judgment in pursuance of the *cognovit*, as directed *ante*, 680(x). This is a final judgment, and has the same effect as a judgment upon verdict. Where the landlord defended the action at his own expense, but in the name of his tenant, the court, upon application, set aside a judgment entered up on a *cognovit* given by the tenant, and let in the landlord to defend the action in his own name(y).

Replication,
&c.

Replication, &c.] The plaintiff will reply as in other cases. If he do not, and the defendant wish to compel him to do so, he should pursue the directions pointed out *ante*, 751.

Discontinu-
ance.

A discontinuance is allowed in an ejectment. The court will not, however, give the plaintiff leave to discontinue, after a special verdict has been had, in order to adduce fresh proof in contradiction to the verdict(a).

7. Incidental Proceedings.

7. Incidental
Proceedings.

Particulars of Premises, &c.] The defendant, if there be any reasonable doubt as to the lands, &c., for which the ejectment is brought, may take out a summons before a judge, and obtain an order, calling upon the plaintiff to give him a bill of particulars(b). The court or a judge may also, under circumstances, order the defendant to give a particular of the premises for which he defends.

Of Breaches
of Covenant.

Also, where the ejectment is brought for a forfeiture, the court or a judge, upon application, will order the lessor of the plaintiff to give the defendant a particular of the covenants and breaches, &c., on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of anything not contained in those particulars(c).

Of Lessor's
Residence, &c.

Where the lessor of the plaintiff is unknown to the defendant, the latter may call for a particular of his residence or place of abode from the opposite attorney, and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court or a judge will stay proceedings until security be given for costs(d).

Security for
Costs, and
staying Pro-
ceedings.

Security for Costs(e) and staying Proceedings.] The defendant may move to stay proceedings until a guardian shall be ap-

(s) *Doe Grubb v. Grubb*, 5 B. & C. 457.

(t) See *ante*, 674, as to *cognovits* in general.

(u) See the form of *cognovit*, Chit. Forms, 372.

(x) See the form of *præcipe* for appearance, Chit. Forms, 371; and of the entry on roll, *Id.* 372.

(y) *Doe Locke v. Franklin*, 7 Taunt. 9; 1 Chit. 390, n., S. C.; see *Payne v. Rogers*, 1 Doug. 407; 2 H. Bl. 342, S. C.; *Doe v. Dyer*, 3 Dowl. 696.

(a) *Doe Gray v. Gray*, 2 W. Bl. 815.

(b) *Doe Saunders v. Newcastle, Duke of*, 7 T. R. 332. See form of order and particulars, Chit. Forms, 374, 375.

(c) *Doe Birch v. Phillips*, 6 T. R. 597; *Tenny v. Moody*, 3 Bing. 3; 10 Moore, 252, S. C.; *Sawter v. Hitchcock*, 5 Dowl. 724. See form of particulars, Chit. Forms, 375.

(d) *Tidd*, 476; and see *ante*, Vol. I. 52.

(e) As to the recognisance for costs in ejectments under 1 G. 4, c. 87, see *post*, 778.

pointed for an infant lessor, to answer costs(*f*); or, where the lessor of plaintiff is abroad or dead, or is unknown, until security be given for costs(*f*).

So the court or a judge will, in general, stay proceedings in a second action, until the costs in the first shall be paid(*g*). And this although the former action was discontinued before consent rule or plea(*h*).

In second
Action.

Where the defendant moved to stay proceedings in an ejectment, upon the ground that the title of the lessor of the plaintiff had determined since the commencement of the action, the court refused the rule, saying, that the plaintiff had a right to proceed for the recovery of his damages and costs(*i*).

Not for Ces-
ser of Title.

In ejectment on a clause of re-entry in a lease for breach of covenant to repair, the court has no power to stay proceedings even on payment of costs, though it appears that the necessary repairs were done before the commencement of the action(*j*).

For Non-
repair.

In ejectment for non-payment of rent, if the tenant or his assignee, or mortgagee(*k*), shall at any time before trial, but not after(*l*), pay or tender to the landlord, his executors, or administrators, or to the attorney in the cause, or pay into court, all rent and arrears, together with the costs, then all further proceedings shall cease and be discontinued(*m*). Where the landlord had obtained possession under an *habere*, the court refused to compel him on motion to pay over to the tenant the value of the crops deducting the rent(*n*).

In Ejectment
for Non-pay-
ment of Rent.

Also in ejectment by a mortgagee, (or in an action on a bond, or a bond for payment of the money secured by the mortgage, or performance of the covenant therein contained), where no suit in equity for foreclosure or redemption is depending, if the person having a right to redeem (provided that such party be a defendant in the action) (*o*) shall, at any time pending the action (*p*), pay to the mortgagee, or, in case of his refusal, pay into court, the principal and interest due on the mortgage, with such costs as have been expended in any suit at law or in equity on such mortgage, (such money for principal, interest, and costs to be ascertained by the court where such action is pending, or by its officer), it shall be deemed and taken to be in full satisfaction of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly, and order a re-conveyance, &c. (*q*). This, however, does not

By Mortgagee
against Mort-
gagor.

(*f*) *Post*, Book IV. Part I. Ch. 11. Where the infant lessor was a pauper, the court discharged a rule calling on him to find security, upon the terms that the infant's father should be substituted for the nominal plaintiff. (*Doe Roberts v. Roberts*, 6 Dowl. 556).

(*g*) *Post*, Book IV. Part I. Ch. 10: *Doe Thomas v. Shadwell*, 7 Dowl. 527; *Doe Selby v. Alston*, 1 T. R. 491; *Keene d. Angel v. Angel*, 6 Id. 740; and see *Doe Rees v. Thomas*, 4 D. & R. 145; *Doe Williams v. Winch*, 3 B. & Ald. 602; *Harr. L. & T.* 871.

(*h*) *Doe Langdon v. Langdon*, 5 B. & Ad. 864; 2 Nev. & M. 848.

(*i*) *Thrustout v. Grey*, 2 Str. 1056; see *Spicer v. Dodd*, 1 Dowl. 306; 2 C. & J. 165, S. C.

(*j*) *Doe Mayhew v. Asby*, Q. B., E. 1839;

3 Jurist, 458.

(*k*) *Doe Whitfield v. Roe*, 3 Taunt. 402.

(*l*) *Roe v. Davies*, 7 East, 363; see *Doe Lambert v. Roe*, 3 Dowl. 557.

(*m*) 4 G. 2, c. 28, s. 4: see *Doe v. Masters*, 2 B. & C. 490; *Doe Harcourt v. Roe*, 4 Taunt. 883; see *post*, Book IV. Part I. Ch. 10. See the forms, *Chit. Forms*, 375, 376.

(*n*) *Doe v. Witherwick*, 10 Moore, 267; 3 Bing. 11, S. C.

(*o*) *Doe Hurst v. Clifton*, 6 Nev. & M. 357; 4 A. & El. 814. The mortgagee sufficiently shews that he has become defendant, by stating in his affidavit that he has entered an appearance, without going on to say that he has signed the consent rule. (*Doe Cox v. Brown*, 6 Dowl. 471).

(*p*) See *Doe Tubb v. Roe*, 4 Taunt. 387.

(*q*) 7 G. 2, c. 20, s. 1.

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extend to cases where the right of redemption is controverted, or the money due is not adjusted; nor shall it prejudice any subsequent mortgage (*r*). A first mortgagee brought an action of covenant on the covenant in the mortgage-deed, having received notice from a second mortgagee not to deliver up the deed; the mortgagor applied to the court to compel the plaintiff under the 7 *G.* 2, *c.* 20, to re-convey the premises upon payment of the principal, interest, and costs; and the court held it to be a case within the statute, and made the order (*s*). The defendant is entitled to have the proceedings stayed, under this statute, without paying any by-gone interest, or the expense of preparing the mortgage-deed, or any assignment of it (*s*). The costs are taxed in C. P. only as between party and party, and not as between attorney and client (*t*).

Under 11 *G.*
4 & 1 *W.* 4,
c. 70.

As to staying the proceedings where the plaintiff is endeavouring to proceed to a trial at the assizes under the provisions of the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 36, see *post*, 783, 784.

Striking out
Demises, &c.

Striking out Demises, Setting aside Plea, &c.] Where a demise is inserted in the declaration in the name of a party without his consent, the court or a judge will order it to be struck out (*u*), unless the justice of the case would be defeated, and the party has had an indemnity tendered to him before the ejectment was brought (*x*). The application should be made on behalf of such party, and as speedily as possible after he has knowledge of the proceedings (*y*).

Setting aside
Appearance,
&c.

If the appearance and plea be entered in the name of the tenant, or any other person, against his consent, the court or a judge will order it to be set aside (*z*).

As to setting aside judgment by default, see *ante*, 747.

Consolidating
Proceedings.

Consolidating Proceedings.] Where several ejectments are brought for the same premises upon the same demise, the court on motion, (which is for a rule *nisi*), or a judge at chambers, will order them to be consolidated (*a*). The lessor of the plaintiff having brought three ejectments in the King's Bench for the same property, the court stayed the proceedings in two of them, and compelled the plaintiff to confine himself to one, upon certain terms, which rendered it probable that, in the event, he would have to pay the costs; whereupon he brought an ejectment for the same property in the Common Pleas, but the proceedings thereon were stayed by that court (*b*).

Several De-
fences.

Where there are several defendants to whom the plaintiff

(*r*) *Id.* s. 3: see *Doe Kay v. Soley*, 2 *W.* Bl. 726: *Bingham d. Redhead v. Oakes*, Barnes, 182: *Felton v. Ash*, *Id.* 177: *Goodright v. Moore*, *Id.* 176: *Archer v. Snatt*, 2 *Str.* 1107; *Andr.* 341, *S. C.*: *Anon.*, 1 *Str.* 413: *Goodtitle v. Pope*, 7 *T. R.* 185: *Berthen v. Street*, 8 *Id.* 326.

(*s*) *Dixon v. Wigram*, 2 *C. & J.* 613.

(*t*) *Doe Blagg v. Steel*, 1 *Dowl.* 359.

(*u*) *Doe Capps v. Capps*, 3 *Bing. N. C.* 768.

(*v*) *Doe Hurst v. Clifton*, 4 *Ad. & El.* 809.

(*x*) *Adams, Eject.* 185: *Doe Vine v. Fig-*

gins, 3 *Taunt.* 440: *Doe Hammett v. Corporation of Plymouth*, 2 *Chit. Rep.* 170: *sed quare*, as to the necessity for the tender being before action.

(*y*) See *Doe Shepherd v. Roe*, 2 *Chit. Rep.* 171; *Id.* 170: what authority sufficient, *Doe Hurst v. Clifton*, *supra*. See form of affidavit, *Chit. Forms*, 377.

(*z*) *Ante*, 749.

(*a*) *Harr. L. & T.* 847: *post*, Book IV. Part I. Ch. 8.

(*b*) *Doe Carthew v. Brenton*, 6 *Bing.* 469; 4 *Moo. & P.* 166, *S. C.*

delivers declarations for the recovery of the same premises, the court would probably now, since the 3 & 4 W. 4, c. 42, (which gives one of several defendants who is acquitted his costs), on the motion of the plaintiff, join them all in one declaration, although they are severally concerned in interest, though before that act the court would not do so (c).

8. The Issue and Nisi Prius Record.

When you have got the consent rule from the master, as directed ante, 751, make a copy of it; make up the issue upon plain paper, substituting the name of the tenant, &c., for that of the casual ejector, Richard Roe, in the declaration. It may be here again observed, that the recent rules of H. T., 4 W. 4, prescribing the form of an issue, &c., do not apply to an ejectment (d). In actions by *original*, it is more correct to intitle the issue of the same term as the declaration (e); although it may be and usually is intitled of the term in or of which issue was joined, in the same manner as in actions by bill. In actions by *bill*, the issue should be intitled of the term in or of which issue is joined (f). In an ejectment by *landlord*, where the tenancy has expired, or the right of entry accrued in or after either of the issuable terms, and the proceedings are under the 11 G. 4 & 1 W. 4, c. 70, s. 36 (g), the issue should be intitled of the day on which the declaration is specially intitled. In actions by *original*, the issue, after stating the term, commences at once with an entry of the declaration. In actions by *bill*, the issue commences with a memorandum, prefatory to the declaration and proceedings. The declaration and pleadings must be correctly copied in the issue (h), each forming a separate paragraph. In actions by *bill*, when the plea is of a term subsequent to that in which the issue states the bill to have been exhibited, it may, it seems, be necessary (notwithstanding the rules of H. T., 4 W. 4, which have been held not to extend to an ejectment) in the issue to continue the plea to the bill by an imparlance, otherwise it would be a discontinuance: in practice, however, this is now rarely done. At all events, there is no need of continuing the bill down, from term to term, to the plea (i), for the course is, if an imparlance be entered at all, at once to enter one to the first day of the term in or of which issue is joined, being the term of which the issue is intitled, without any regard to the times at which the plea and subsequent pleadings have been delivered. There is clearly no need of a continuance at all, if the issue be joined in the same term the bill is alleged to have been exhibited. Nor is it necessary to enter an imparlance on the replication, &c., though, in fact, delivered of a subsequent term; for it is presumed to be of the same term with the preceding pleadings (k). In actions by *original*, it never was necessary to enter any continuances on the plea, &c., in making up the issue; for the declaration, and all the subsequent pleadings, are supposed to be of the same term (l). After the pleadings

8. The Issue
and Nisi Prius
Record.
Form of.

(e) See Run. Eject. 187.

(d) See ante, 733.

(e) See *Lee v. Clarke*, 2 East, 333.

(f) *Wood v. Miller*, 3 East, 204.

(g) *Post*, 783, 784.

(h) See *Aaron v. Chaundry*, 4 D. & R.

41; 2 B. & C. 562, S. C.

(i) *Curlewis v. Dudley*, 2 L. Raym. 872;

1 Salk. 179, S. C.: *Fletcher v. Richardson*,

Hardw. 322.

(k) 5 Co. 75.

(l) 2 Saund. 1 e.

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how made up.

are all copied in their order, the issue concludes, as in ordinary cases, with an award of the *venire facias*, as a continuation of the last paragraph (m). *The practice as to when and by whom the issue is to be made up, is the same as in ordinary cases.* (See ante, Vol. I. 202). *Indorse the notice of trial on the issue, and annex to it the copy of the consent rule, and deliver them to the defendant's attorney. Then sue out jury process, make up your Nisi Prius record, enter the cause for trial, and deliver your briefs to counsel, as in other cases (n), except that the Nisi Prius record is in form somewhat different (o).*

Form of Nisi
Prius Record.

The record of *Nisi Prius* will, in general, be in the ordinary form; but in an ejectment by a landlord under the above act of 11 G. 4 & 1 W. 4, c. 70, s. 36, when the declaration has been delivered in or after an issuable term specially intitled of the day after the demise, then, in making up the record, the proceedings should be stated accordingly. The court have refused to set aside the verdict, on the ground that there was a variance between the description of the premises in the *Nisi Prius* record and the issue; it not being stated how the premises were described in the declaration delivered (p).

9. The Notice of Trial.

9. Notice of
Trial.

The time for giving notice of trial is the same as in ordinary cases (q). But in an ejectment by a landlord, where the tenancy has expired, or a right of entry accrued in or after either of the issuable terms, and the landlord has delivered a declaration in or after the term, within ten days after his right of entry accrued, *and with a notice to appear and plead thereto in ten days*, then, at least six clear days' notice of trial before the commission day at the assizes must be given: the judge may, however, postpone the trial to the next following assizes (r). By appearing and defending at the trial, the defendant cures any defect in the notice (s).

Form of, and
when to be
given.Costs for not
trying pursu-
ant to Notice,
&c.

If the plaintiff do not proceed to trial in pursuance of his notice, without having countermanded it in time, the defendant shall have his costs of the day, or judgment as in case of a nonsuit, as in other cases (t).

10. Proceedings at the Trial.

10. Proceed-
ings at the
Trial.Right of Par-
ties to be
heard sepa-
rately.

The Trial, &c.] There being but one plaintiff in ejectment, in case there be several lessors, they cannot be heard separately by counsel, although they are separately interested (u). And if a landlord and tenant defend by different attorneys, and have different counsel, but it appears that the tenant claims no title but what he derives from the landlord, the judge at the trial will only allow one counsel to address the jury for the defence; but the party's counsel, who does not address

(m) See various forms, Chit. Forms, 378, 379.

(n) See the forms of the issue and notice of trial, the *Nisi Prius* record, the jury process, &c., Chit. Forms, 378, 379, 380: Chit. Sum. Pract. 374.

(o) See the form, Chit. Forms. 379.

(p) *Doe Cotterill v. Wyld*, 2 B. & Ald. 472.

(q) See Vol. I. 208, &c.

(r) 11 G. 4 & 1 W. 4, c. 70, s. 36, *post*, 783.

(s) *Doe Antrobus v. Jepson*, 3 B. & Ad. 402: ante, Vol. I. 212.

(t) See *post*, Book IV. Part I. Ch. 23, 24.

(u) *Doe Fox v. Bromley*, 6 D. & R. 292.

the jury, will be at liberty to cross-examine and also to call witnesses(x).

CHAP. I.
SECT. I.

Evidence.

The plaintiff should, in general, be prepared to produce the consent rule as part of his case: but where there is no doubt as to the identity of the premises sought to be recovered with those for which the tenant defends, he is not bound to produce it(y). Proof of the service of the declaration on the tenant in possession is sufficient, without producing the landlord's rule to shew that the defendant comes in as landlord(z). The defendant may, of course, give any special matter of defence in evidence under the general issue; and he will be entitled to begin to give evidence, and to the reply, as he would in ordinary cases if his special matter of defence were pleaded(a).

Also, if the lessor of plaintiff entered into any part of the premises after issue joined and before trial, the defendant may plead this matter *puis darrein continuance*(b).

Plea puis darrein continuance.

If the defendant do not appear and confess lease, entry, and ouster, and that he or his tenant was in possession of the premises at the time of the service of the declaration, then, after calling the defendant, (and his attorney, if he be within the rule), the plaintiff must be called and nonsuited; and, at the prayer of the plaintiff, this fact is entered on the *postea*, namely, the plaintiff was nonsuit, because the defendant did not appear and confess lease, entry, and ouster, which will entitle him to sign judgment against the casual ejector(c). So, if there be several defendants, and some of them do not appear and confess lease, entry, and ouster, a verdict must be taken for them, but with an indorsement on the *postea* that it was because they did not appear and confess(d); and the trial proceeds as to the defendants who have appeared(e).

Proceedings where Defendant does not appear at the Trial.

But in all cases of ejectment by *landlord* against *tenant*, if the defendant do not appear at the trial, and confess lease, entry, and ouster, then, upon proof that such defendant or his attorney was regularly served with notice of trial, the plaintiff shall not be nonsuit; but the production of the consent rule shall in all such cases be sufficient evidence of the lease, entry, and ouster(f).

The plaintiff is not restricted in his proof to the number of acres, &c., or quantity of estate set forth in his declaration. Therefore, if he declare for 40 acres, he may recover 20; if he demand a moiety, he may recover a third(g). If the verdict be special, it should appear upon the face of it that the lessor of the plaintiff had a right of entry at the time he commenced his ejectment(h).

The Verdict.

In ordinary cases of ejectment, the *damages* given are merely nominal; the damages actually sustained by the detention of the property, &c., being usually recovered in an action of

The Damages.

(x) *Doe Hogg v. Tindale*, 3 C. & P. 565.

Salk. 456.

(y) *Doe Greaves v. Raby*, 2 B. & Ald.

(e) See the form of *postea* in this case, Chit. Forms, 383.

948: *sed vide Doe Lamble v. Lamble*, 1 M. & M. 237.

(f) 1 Geo. 4, c. 87, s. 2.

(z) *Doe Giles v. Warwick*, 5 M. & Sel. 493.

(g) *Denn Burgess v. Purviss*, 1 Burr. 326: *Doe v. Wipple*, 1 Esp. 360.

(a) Vol. I. 269, &c.

(b) *Ante*, Vol. I. 300: 2 Sel. 192.

(c) Bul. N. P. 98. See the form of

(h) See *Taylor v. Horde*, 1 Burr. 60, 74: *Chaman v. Brown*, 3 Burr. 1626: *Broughton v. Langley*, 3 L. Raym. 154: *Thornhy v. Fleetwood*, 1 Str. 318: *Holdfast v. Dow-sing*, 2 Id. 1253.

postea in this case, Chit. Forms, 381.

(d) Bul. N. P. 98: *Clacmore v. Searle*, 1 L. Raym. 729: see *Greaves v. Rolls*, 2

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trespass for mesne profits (*i*). But in ejectment by landlord against *tenant*, whether the defendant appear at the trial or not, the plaintiff, after proof of his right to recover possession of the whole or any part of the premises, may proceed to give evidence of the mesne profits thereof, which shall have accrued from the day of the determination of the tenant's interest, down to the time of the verdict, or to some preceding day to be specially mentioned therein; and the jury shall thereupon give their verdict, both as to the recovery of the premises, and as to the amount of the damages to be paid as mesne profits (*k*). If the plaintiff wish also to recover the mesne profits, from the time of the verdict down to the time possession is delivered to him, he may afterwards proceed for it by action of trespass for mesne profits (*k*). In an ejectment for the recovery of premises conveyed for the purposes of the 1 & 2 W. 4, c. 38, (the recent act for the building of additional churches), the jury who try the ejectment, or the jury under a writ of inquiry, are to ascertain the value of the premises, &c. (*s*. 18).

Certificate for
speedy Execution.

After being nonsuit for this cause, or on a verdict for the plaintiff, he could not, before the passing of the 11 G. 4 & 1 W. 4, c. 70, obtain judgment till the ensuing term; but now, (by the 38th section of that act, *post*, 765), if the judge who tried the cause shall think fit to certify (*l*) that possession should be *immediately* obtained, a writ shall issue accordingly, and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued, altering the form of the writ of execution accordingly, and as directed *post*, 765, 766 (*m*). The judge will not perhaps grant this certificate on a nonsuit, unless an affidavit, stating the circumstances of the case, be laid before him (*n*). Supposing you do not obtain this certificate, and proceed according to this act, then the case must take its regular course; and you may, on and after the day in banc (*o*), or, if the cause be tried in the vacation, on the first day of the ensuing term, and even before the *postea* has been delivered out by the associate (*p*), sign judgment against the casual ejector, as directed *ante*, 745, 746, in the same manner as if the defendant had never appeared and pleaded, and sue out execution (*q*). You may also proceed upon the consent rule for your costs (*r*).

Staying Execution.

As to staying execution in ejectment between landlord and tenant, where the verdict is against evidence or the damages excessive, see *post*, 782.

11. Costs.

11. Costs.

Who entitled to.] The prevailing party is entitled to costs in nearly the same cases as in personal actions. If no person

(i) Vol. I. 322.

(k) 1 G. 4, c. 87, s. 2, *post*, 781.

(l) See form of certificate, Chit. Forms, 381.

(m) The 1 W. 4, c. 7, noticed *ante*, Vol. I. 331, *post*, 763, has other provisions of a similar nature relative to other actions, and they seem cumulative.

(n) *Doe Williamson v. Dawson*, 4 C. & P. 589; *post*, 765; *ante*, Vol. I. 332. And see form of affidavit, Chit. Sum. Pract.

374; Chit. Forms, 381.

(o) *Doe Lord Palmerston v. Copeland*, 2 T. R. 779; *ante*, Vol. I. 330.

(p) *Doe Davis v. Williams*, 2 D. & R. 229; 1 B. & C. 118, S. C.

(q) See Chit. Forms, 390, 391, 392, 393.

(r) *Goodright v. Vice*, Barnes, 182; *Doe Prior v. Salter*, 3 Taunt. 485; see *Thrustout v. Bedwell*, 2 Wils. 7.

appear to the ejectment, and judgment be consequently entered against the casual ejector, the plaintiff has no other remedy for his costs than by his action for mesne profits, noticed hereafter (*s*), in which they are recoverable against the tenant as consequential damages (*t*). If there be several defendants, and the plaintiff have a verdict, each of them is liable for the entire costs, even although they defend severally (*u*). If several defend jointly, and succeed, they shall be entitled to costs; but the plaintiff may pay the costs to which of them he pleases (*x*); if they defend severally, they are entitled to costs if they succeed, in the same manner as in other cases (*y*). So, if the plaintiff be nonsuit on the merits, the defendant is entitled to costs (*z*); but where he is nonsuit because the defendant has not confessed lease, entry, and ouster, we have seen (*ante*, 751, 759) that, so far from being liable to costs, he is entitled to them from the defendant according to the terms of the consent rule. The defendant is entitled to costs on a *nonpros* for the plaintiff's not replying when the lessor of the plaintiff has joined in the consent rule, or for not proceeding to trial according to notice, or on a judgment as in case of a nonsuit (*a*). By rule II. T., 2 W. 4, r. 74, the defendant is entitled to costs on those issues on which he succeeds. Where the declaration contained one count only, and the property mentioned in the declaration consisted of three messuages, as to two of which the jury found for the plaintiff, and for the defendant as to the residue, the defendant was held to be entitled to his costs, so far as related to the messuage which the plaintiff failed to recover (*b*). It is entirely for the decision of the master to refer particular costs incurred at the trial to one issue or the other, and it being a mere question of fact, the court will not interfere (*c*).

How recovered.] If the plaintiff have a verdict against the defendant, he recovers his costs by execution, or by action, as in other actions; but if entitled to costs under the consent rule, for not confessing lease, entry, and ouster, the way of recovering them is either by execution founded on the consent rule, under the 1 & 2 V. c. 110, s. 18, which, it would seem, authorizes execution in this case (*d*), or by attachment for non-payment, which, before the 1 & 2 V. c. 110, s. 18, was the only remedy (*e*). The mode of proceeding by attachment is as follows: *Give the defendant the usual one day's notice of taxation, as directed post, Book IV. Part I. Ch. 31, title "Costs;" then take the judgment paper, consent rule, and postea, to one of the masters, and he will tax the costs upon the rule. Then, make a copy of the rule and allocatur; serve it personally*

How recovered.

By Plaintiff.

(*s*) *Post*, 785.(*t*) *Morris v. Barry*, 1 Wils. 1; 2 Str. 1180, S. C.; *Symonds v. Page*, 1 C. & J. 29.(*u*) *Bul. N. P.* 335, 336.(*x*) *Jordan v. Harper*, 1 Str. 516; *Duthy v. Tito*, 2 Id. 1203.(*y*) 8 & 9 W. 3, c. 11, s. 1; see the 3 & 4 W. 4, c. 42, s. 32.(*z*) 4 J. 1, c. 3.(*a*) See *Tidd*, Supp. 189; *ante*, 751.(*b*) *Doe v. Errington*, 4 Dowl. 602; see *Doe v. Hughes*, 4 Dowl. 412.(*c*) *Doe v. Webber*, 4 Nev. & M. 381. See further as to the costs, where there are several issues, *post*, Book IV. Part I. Ch. 31.(*d*) See, as to execution upon a rule of court, *post*, Book IV. Part I. Ch. 34, title "Motions and Rules;" and see a form of *fi. fa.* against the defendant on the consent rule for costs after nonsuit for not confessing lease, entry, and ouster, *Chit. forms*, 387; *ca. sa.* for same, *Id.* 388.
(*e*) See *Runn. Eject.* 415.

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on the defendant, at the same time shewing him the original rule; make a demand of the costs, and if he do not pay them, move the court, upon an affidavit of the demand and refusal (f), for an attachment against him (g).

How, by Defendant.

If the defendant were entitled to costs, either upon verdict or where the plaintiff was nonprossed or nonsuit, his only remedy, previously to the 1 & 2 V. c. 110, s. 18, was by attachment; for, the lessor of the plaintiff not being a party to the record, he could not have had a writ of execution against him, but must have proceeded upon the consent rule only. But now, by force of the 18th section of that Act, it would seem that the order for payment of costs in the consent rule may be enforced by execution (h). The mode of proceeding by attachment is as follows: *Tax costs upon the postea, as in other cases, make copies of the rule and allocatur, and serve them on the lessor of plaintiff, at the same time shewing him the originals, and demanding the costs; and if he do not pay them, move the court upon an affidavit of the demand and refusal (i), for an attachment against him (k).* Suing out a *ca. sa.* against the nominal plaintiff is unnecessary (l); and the defendant may at once proceed on the consent rule, in the manner directed *supra*, as to the plaintiff's proceeding for costs upon a nonsuit (m). The remedy by execution is, however, preferable.

How affected by Death of Parties.

How affected by Death of Parties.] Where the lessor of the plaintiff died between the commission day and the trial, and the plaintiff was nonsuit on the merits, it was holden, that the executor of the lessor was not liable for the costs of the nonsuit (n). Where husband and wife were lessors, and the former died after entering into the rule, the wife was, notwithstanding, held liable for the costs; because they were to be paid by the lessor of the plaintiff, and both of them were such (o).

Where ordered to be paid by third Parties.

When Ordered to be Paid by Third Parties.] The court may, under circumstances, in ejectment, though not in any other action (p), compel the real defendant to pay the costs, though he is no party to the record (q). And where A. was the tenant in possession of part of the premises and landlord of the whole, and B. and C., his tenants of other parts, were mere paupers, and three ejectments were brought against them, to which three appearances were entered, it was considered that the lessor of the plaintiff, to secure his costs of the proceedings against the paupers, might have applied to the court, or a judge at chambers, to set aside, with costs,

(f) See the forms, Chit. Forms, 386.

(g) Formerly, in the Exchequer, a *subpoena* against the casual ejector was necessary, but this is not now requisite. (See *Doe Fry v. Fry*, 2 C. & M. 234.)

(h) See as to execution upon a rule of court, *post*, Book IV. Part I. Ch. 33, title "Motions and Rules:" and see a form of *fi. fa.* against the lessor of the plaintiff on the consent rule for costs after a nonsuit on the merits, Chit. Forms, 388; of *ca. sa.* for same, *Id.* 389; of *fi. fa.* for same after verdict for defendant, *Id.* 389; of *ca. sa.*

for same after verdict for defendant, *Id.* 389.

(i) See the form, Chit Forms, 386.

(k) Run. Eject. 416.

(l) *Doe Fry v. Fry*, 2 Dowl. 265; 2 C. & M. 234, S. C.

(m) *Doe Prior v. Salter*, 3 Taunt. 485.

(n) *Doe Payne v. Grundy*, 2 D. & R. 437; 1 B. & C. 284, S. C.: see *Doe v. Ford*, 2 Smith, 407.

(o) *Harr. L. & T.* 865.

(p) *Hayward v. Giffard*, 6 Dowl. 699; 4 M. & W. 194, S. C.

(q) *Doe Masters v. Grey*, 10 B. & C. 615.

the appearances and pleas, and for the lessor to be at liberty to sign judgment against the casual ejectors, unless the landlord would come in and defend as landlord for the premises in possession of his tenants, the two paupers; or (as A., the landlord, was one of the parties served with the ejectment) that the lessor of the plaintiff might have obtained a consolidation rule, that the ejectments brought against the tenants should have abided the event of the verdict in the action against the landlord; taking care to have incorporated with such rule that A. (the landlord) should pay the costs of those ejectments brought against the tenants, in the event of such verdict being in favour of the lessor of the plaintiff(r). In the same case A., (the landlord of the whole and tenant of part), instead of entering into the landlord's rule, obtained a rule for the consolidation of the three actions, and that the ejectment against his tenant B. should abide the event of the ejectment against his tenant C.; the ejectment was tried, and the lessor of the plaintiff obtained a judgment against C., and took possession of all the premises, and the court compelled A. (the landlord) to pay the costs of that ejectment; but the lessor of the plaintiff was compelled to pay his own costs of the application(s). And in *Berkeley v. Dimery*(t), Lord Tenterden said, "That in an ejectment the tenant in possession must be sued; and the court will not permit a person to put a mere pauper into possession merely to evade the costs."

So, on the other hand, if a stranger carry on a suit in the name of another, who has title, and yet is so poor that he cannot pay the costs; in case he fail, the court, on affidavit of the circumstances, will order the person who carried on the suit to pay costs to the defendant(u). And see as to compelling security for costs in general, *ante*, 754, and *post*, Book IV. Part I. Ch. 11.

12. The Judgment.

If a verdict have been given, let the prevailing party *get the record of Nisi Prius from the associate, and, in town causes, indorse the postea on it, as directed Vol. I. 328 (v)*. If the verdict be not set aside, or the judgment arrested, within the time allowed for that purpose(x), then, if the verdict be for plaintiff, proceed to tax costs, as directed *post*, Book IV. Part I. Ch. 31, title "Costs," and sign final judgment, as directed Vol. I. 333. If the verdict be for the defendant, or plaintiff be nonsuit, costs are taxed upon the consent rule, as mentioned *ante*, 761(y).

12. The Judgment.

(r) *Thrustout v. Shenton*, 10 B. & C. 110; 5 Man. & Ry. 443.

(s) *Ibid*.

(t) 10 B. & C. 113, n.

(u) *Runn. Eject.* 417.

(v) See the references to the forms, *infra*.

(x) See Vol. I. 331.

(y) See also, upon this subject, *Worral v. Bent*, 2 Str. 835; *Fisher v. Hughes*, Id. 908; *Morris v. Barry*, Id. 1180; *Farr v. Denn*, 1 Burr. 362; *Deckrow v. Jenkins*, Cro. Car. 178; *Taylor v. Wilbore*, Cro. El. 768; Co. Lit. 285; *England v. Slade*, 4 T. R. 683; *Lindsey v. Clarke*, 5 Mod. 285. See the form of *postea*, upon a nonsuit, for defendant's not confessing lease, entry,

and ouster, Chit. Forms, 381; and of judgment against casual ejector and writ of possession, in such a case, Id. 367, 368; of *postea* and judgment, &c., upon a nonsuit for any other cause, Id. 383; of *postea* and judgment, &c., upon verdict for defendant, Id. 383, 385; of *postea* on verdict for plaintiff, Id. 382; and judgment thereon, Id. 384; of *postea* where jury find against one defendant, and for another by reason of his not confessing lease, entry, and ouster, Id. 383; and judgment thereon, Id. 385; of *postea* where a moiety only is recovered, Id. 382; and judgment thereon, Id. 384; of *postea* where part is found for plaintiff and part for defendant, Id. 383; and of judgment thereon, Id. 385.

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PART I.After Certifi-
cate for im-
mediate Exe-
cution.

It may be observed, that if the judge who tried the cause certifies only under the 11 *G. 4* & 1 *W. 4*, c. 70, s. 38(z), that a writ of *possession* ought to issue immediately, and such writ be issued accordingly, the *costs* are taxed, and the *judgment* is, in general, signed and executed *afterwards* at the usual time, as if no such writ issued. The 1 *W. 4*, c. 7, however, (which, by sect. 5, does not destroy the above provision of the 11 *G. 4* & 1 *W. 4*, c. 70), allows the judge who tried the cause to certify, on the back of the record, before the end of the sittings or assizes, that execution ought to issue *forthwith*, or at some future day, and subject or not to any qualification or condition; and if the judge certifies under this act, the costs may be taxed, and judgment signed *forthwith*; and execution may be issued forthwith or afterwards, according to the certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, must be entered of record as of the day on which the judgment was signed; but the party entitled to such judgment may, if he chooses, postpone signing it(a).

13. Error.

13. Error.
Bail in.

The proceedings upon a writ of error on a judgment in ejectment are the same (with one or two exceptions) as in other cases. Bail is required where the defendant brings a writ of error after verdict for the plaintiff(b); and the recognisance is taken for the amount of double the yearly value, and double the costs of the ejectment(c). The recognisance must be given, although the defendant has already put in and justified bail under 1 *G. 4*, c. 87(d). Putting in and perfecting bail in error will discharge the recognisance given under s. 3 (not to commit waste)(e). It is not necessary that the plaintiff in error should join in the recognisance; or, if he do, he cannot be examined as to his sufficiency(f).

By whom,
and when
brought.

As the casual ejector cannot bring error, being a mere nominal person, that writ can only be brought after the defendant has appeared and confessed lease, entry, and ouster(g); even if the landlord be permitted to defend, a writ of error cannot issue in the name of the casual ejector. But if a writ of error, *coram nobis*, is sued out in the name of the casual ejector, it must be taken to be sued out at the instance of a proper party, until it is set aside(h). And, on a writ of error from an inferior court, in the name of the casual ejector, the court will not order a *nonpros* to be entered, though his release of errors be shewn, because inferior courts are not competent to proceed by the consent rule(i).

What may be The death of the nominal plaintiff cannot be assigned for

(z) *Post*, 765.

(a) See Vol. I. 331.

(b) 16 & 17 C. 2, c. 8, s. 3.

(c) *Keene Byron v. Deardon*, 8 East, 298; *Thomas v. Goodtitle*, 4 Burr. 2501.(d) *Roe v. Moore*, 7 Bing. 124; 4 Moo. & P. 761.(e) 1 *G. 4*, c. 87, s. 3.(f) *Keene v. Deardon*, 8 East, 298. By the 6 *G. 4*, c. 96, s. 1, bail in error is now requisite in all *personal* actions, after judgment by default or on demurrer, aswell as after verdict, unless the court or a judge will by special order dispense with the same; which they will not do unless substantial ground of error be shewn. (*Wadsworth v. Gibson*, 4 Bing. 572; 1 Moo. & P. 501, S. C.) But an ejectment, being a *mixed* and not a *personal* action, does not, it seems, come within this enactment.(g) 2 Sellon, 205; *George v. Wisdom*, 2 Burr. 757.(h) *Doe Faithful v. Roe*, 7 Dowl. 718.(i) *Runn. Eject*. 421.

error(*i*); nor can a defendant in ejectment assign for error, that, being an infant, he appeared by attorney(*j*). And it seems that nothing can be assigned for error, that would make it necessary to go again into the title of the premises(*k*). The omission of the parish is not error(*l*).

CHAP. I.
SECT. I.
assigned for
Error.

When the plaintiff obtains judgment, and the defendant brings a writ of error, the plaintiff cannot sue out execution until the writ of error be determined(*m*); provided bail in error be put in and perfected when necessary, within the time limited for that purpose. But where the defendant below, pending a writ of error brought by him, brought a new ejectment to recover the same premises, the court would not allow him to proceed in the new action until he quitted possession, or the tenants had attorned to the lessor of the plaintiff in the former action(*n*). Also, where a defendant brought a writ of error, the court obliged him to enter into a rule not to commit waste pending the writ(*o*).

Effect of, on
Execution.

Rule not to
commit
Waste.

And, by the 16 & 17 C. 2, c. 8, s. 4, if upon error brought the judgment be affirmed, or the plaintiff discontinue or be nonsuit, the court from which execution should issue, shall award a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment in the ejectment; and upon the return thereof, judgment shall be given and execution awarded for such mesne profits and damages, and also for costs of suit. The bail in error are also made liable for these mesne profits, damages, and costs; (*Id.* s. 3); but no action can be brought for them against the bail, until their amount have been first ascertained upon a writ of inquiry, as above directed(*p*).

Remedy for
Mesne Profits
and Damages
pending
Error.

14. Execution.

Formerly, the execution could not, in any case, issue out of this court until final judgment was obtained; but now, if the judge who tried the cause shall think fit to *certify* that possession should be *immediately* obtained, a writ may issue accordingly. This is provided for by the 11 G. 4 § 1 W. 4, c. 70, s. 38, which enacts, "that, when a verdict is given for plaintiff, or he is nonsuited for want of defendant's not confessing lease, entry, or ouster, the judge before whom the cause was tried may certify (*q*) his opinion on the back of the record, that a writ of possession ought to issue *immediately*, and, upon such certificate, a writ of possession (*r*) may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards, at the usual time, as if no such writ had issued; provided that such writ, instead of reciting a recovery by judgment, in the form now in use, shall recite shortly that the cause came on for trial at *Nisi Prius*, at such a time and place, and before such a judge, (naming the time, place, and judge), and that thereupon the said judge certified his opinion, that a writ of possession ought to issue immediately." If the lessor

14. Execution.

At what Time
Writ of Pos-
session may be
issued.

(i) *Moore v. Goodright*, 2 Str. 899.

(j) *Ante*, Vol. I. 350. See form of assignment of error in ejectment and joinder, 10 Went. 1, 3.

(k) *Wilkes v. Jordan*, Hobart, 5.

(l) See *Doe v. Gunning*, 2 Nev. & P. 26.

(m) *Jones v. Edwards*, 2 Str. 1241.

(n) *Fenwick v. Grosvenor*, 1 Salk. 258.

(o) *Wharod v. Smart*, 3 Burr. 1823.

(p) *Doe v. Reynolds*, 1 M. & Sel. 247.

(q) See form. Chit. Forms, 381.

(r) See form of writ, Chit. Forms, 391.

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of the plaintiff be *nonsuited* for want of the defendant's confessing lease, entry, and ouster, the judge will not, it seems, grant a certificate under this statute to give immediate possession, unless an affidavit, stating the circumstances of the case, be laid before him. And, *per Taunton, J.*, "Under this act of parliament, there does not appear to be any *discretion* in the judge, as to the time when the possession shall be delivered: we must either grant a certificate to enable the lessor of the plaintiff to get into *immediate* possession, or the case must take its regular course" (*s*). This statute, it will be observed, empowers the judge only to certify, that a *writ of possession* may be issued immediately, but does not allow of such certificate as to a writ of execution for the *costs* or damages (if any); and unless the judge certifies under the 1 W. 4, c. 7, s. 2, noticed *ante*, Vol. I. 331, 397, as it seems he may do, that execution ought to issue for them, the party must wait the ordinary and regular time before issuing it. If the judge does not grant his certificate, allowing the issuing of a writ of possession, then it cannot be issued until final judgment is signed in the ordinary course (*t*).

Alias, &c.,
habere facias
where Posses-
sion has not
been com-
pletely given
under it.

If the writ of *habere facias possessionem* be not executed, then, upon the return of it, you may sue out an *alias* &c. (*u*). But if possession be once completely given under it, the plaintiff cannot sue out another writ of possession, although he be disturbed in his possession by the same defendant, and although the sheriff have not yet returned the writ; otherwise the plaintiff, by omitting to call on the sheriff to return the writ, might retain the right of suing out a new writ of *habere facias possessionem* as a remedy for any trespass which the defendant might commit within twenty years next after the date of the judgment (*x*). In such a case, however, if the disturbance took place recently after the possession delivered, it is probable that the court, upon application, would punish the defendant by attachment (*y*).

Execution for
Plaintiff's
Costs.

The plaintiff may have a separate writ of *fi. fa.* or *ca. sa.* for the costs (*z*); or he may have the *fi. fa.* or *ca. sa.* added to the *habere facias possessionem* in the same writ (*a*).

Execution for
Defendant's
Costs.

The defendant, may now, it would seem, have a writ of execution upon the consent rule for his costs, if he have a verdict, or the plaintiff be *nonprossed* or nonsuit; or he may proceed by attachment (*b*).

(*s*) *Doe Williamson v. Dawson*, 4 C. & P. 589. Where the judge is of opinion that some time ought to elapse before possession is taken, he will grant the certificate on an undertaking by the lessor of the plaintiff not to enforce it before the expiration of a certain period; (*Doe Packer v. Hilliard*, 5 C. & P. 132): *sed quære* if such certificate might not be granted under the 1 W. 4, c. 7, s. 2, *ante*, Vol. I. 331, for the execution, at any time; the provisions of such act being, as it seems, cumulative. But see *Rosc. on Evid.* 4th ed. 172. See form of certificate, *Chit. Forms*, 381; and see *Id.* for a form of the affidavit to procure it. See also a form of certificate under the 1 W. 4, c. 7, *Id.* 101.

(*t*) See forms of a writ upon a single demise, *Chit. Forms*, 390; upon a double demise, *Id.* 390, 391.

(*u*) *Molineux v. Fulgam*, Palm. 289: see *Lessee of Massey v. Ejector*, 1 Jones, Rep. Exch. Ir. 457: *Lessee of Linehan v. Antony*, Batty Rep., Q. B. Ir. 453.

(*x*) *Doe Pate v. Roe*, 1 Taunt. 55: overruling *Radcliffe v. Tate*, 1 Keb. 779: and *semble*, also overruling *Kingsdale v. Marm*, 6 Mod. 27; 1 Salk. 321, S. C.: and narrowing the doctrine laid down in *Tidd*, 9th ed. 1247. (See *Doe v. Mirehouse*, 2 Dowl. 200).

(*y*) See *Davies d. Povey v. Doe*, 2 W. Bl. 892.

(*z*) See the form, *Chit. Forms*, 393.

(*a*) See the forms of writ of possession and *fi. fa.* for costs, in same writ, *Chit. Forms*, 393; the like, with *ca. sa.*, *Id.* 394.

(*b*) *Ante*, 761. See the forms of *fi. fa.* and *ca. sa.* for the defendant's costs in ejectment, *Chit. Forms*, 387 to 389.

It would seem that the 3 & 4 W. 4, c. 67, s. 2, allowing writs of execution to be tested on the day on which the same are issued, and to be made returnable immediately after the execution thereof, is not applicable to writs of execution in an action of ejectment, because that act was passed to amend the Uniformity of Process Act, within which the action of ejectment is not included; the point, however, is not yet settled.

CHAP. I.
SECT. 1.

Teste, and
Return of.

After verdict and judgment, where the landlord defends, execution may be issued against him without any further order of the court: but, when the landlord is admitted to defend, and judgment is entered against the casual ejector, with a stay of execution until further order, and the landlord does not appear at the trial, and the judge does not certify under the 11 G. 4 & 1 W. 4, c. 70, s. 38, or 1 W. 4, c. 7, the lessor, before he takes out execution, must move the court for leave to do so, and the rule is not absolute in the first instance (c). In such a case, a writ of error brought by the landlord may be shewn for cause, and will be a sufficient reason against taking out execution; but, if the landlord omit the opportunity of shewing it for cause, the execution is regular, and cannot be set aside (d).

Leave of
Court, when
necessary.

In order to sue out the writ, *engross it on parchment; get it sealed; at the time you get the writ sealed, you must produce to the sealer of the writs the postea and judgment paper (e); and the judge's certificate for immediate execution, if any. There is no occasion for any præcipe for the writ (f), nor need it be signed (g). Leave the writ at the sheriff's office, and get a warrant on it; give the warrant to the officer, and he will execute the writ, by putting the lessor of the plaintiff, or some person on his behalf, into possession, upon the premises being shewn to him.* The legal fiction of relation to the *teste* of the writ is to be supported in the maintenance of a writ of *habere facias possessionem* (h). Therefore, if tested on the last day of the preceding term, it may be sued out, though the lessor of the plaintiff be since dead. In an ejectment against a *feme sole*, who married before trial, and a verdict and judgment were obtained against her by her original name, it was held, that it was not irregular to issue an *habere facias possessionem* and *fi. fa.* against her by the same name, though the *fi. fa.* was inoperative (i).

Habere Fa-
cias, how sued
out.

The officer, if necessary, may break open doors, in order to execute an *habere facias possessionem*, if the possession be not quietly given up; or he may take the *posse comitatus* with him, if he fear violence (k). And after he has got admission, he may remove all persons, goods, &c., from off the premises before he gives possession (l). If there be several tenements, in the possession of several tenants, the officer must give possession of each separately; the delivery of the possession of one tenement in the name of all, is not sufficient (m); but if the several tenements be in possession of one tenant, and in-

How exe-
cuted.

Where there
are several
Tenements.

(c) *Ante*, 753.

(d) See *Doe Roberts v. Gibbs*, 1 Chit. Rep. 47; *Doe Simons v. Masters*, Id. 233.

(e) R. H., 2 W. 4, r. 75; R. H., 2 & 3

G. 4: *ante*, Vol. I. 420, 421.

(f) R. H., 2 W. 4, r. 76.

(g) Id. r. 75.

(h) *Doe Beyer v. Roe*, 4 Burr. 1970.

Quære as to the effect of the 3 & 4 W. 4, c. 67, s. 2.

(i) *Doe Taggart v. Butcher*, 3 M. & Sel. 557.

(k) 5 Co. 91 b: Vol. I. 408, 409.

(l) *Upton & Wells' case*, 1 Leon. 145.

(m) 2 Ro. Abr. 180: 2 Sellon, 203.

BOOK III.
PART I.

- cluded in the same action, possession of one in the name of the whole will be sufficient. If he give possession of more than he ought, the court afterwards, upon application, will order it to be restored(*n*). Thus, where an ejectment was brought by a tenant in common, to recover five-eighths of a cottage, and the sheriff, in execution of the writ of possession, turned the tenant in possession out of the cottage altogether, the court, upon application, granted a rule upon the sheriff and the lessor of the plaintiff, requiring them to restore the tenant to the possession of three-eighths of the premises(*o*).
- Crops. Where, in ejectment by a landlord against his tenant, who had holden over, the crops upon the lands, when seized under the writ of possession, were more than sufficient to pay the arrears of rent, &c.; yet the Court of Common Pleas refused to order the landlord to pay over the surplus to the tenant(*p*).
- Indemnity to Sheriff. It is the practice for the lessor of the plaintiff to give the sheriff security, to indemnify him from the defendant, and then for the sheriff to give the lessor execution for what he demands(*q*).
- Sheriff's Poundage on. If the yearly value of the premises do not exceed 100*l.*, the sheriff is entitled to a poundage of 12*d.* in every 20*s.*; but if it exceed 100*l.*, then to 6*d.* for every 20*s.* above that sum(*r*).
- Attornment in lieu of. The tenant or tenants in possession, however, in order to save the expense of executing a writ of possession, may attorn to the lessor of the plaintiff(*s*). Let this attornment be written upon unstamped paper, and signed by the tenants in the presence of a witness.
- Entry without Habere Facias. It should also be observed, that the plaintiff having judgment to recover his term, may, it seems, if he can do so without force, enter without suing forth a writ of possession; for, where the land recovered is certain, the recoverer may, without force, enter at his own peril; and the assistance of the sheriff is only to preserve the peace(*t*).
- Execution on Judgment of inferior Court. A judgment in an action of ejectment in an inferior jurisdiction is not within the meaning of the 19 *G.* 3, c. 70, s. 11; and if, therefore, the defendant leaves the jurisdiction, the judgment cannot be removed into a superior court for the purpose of execution(*u*).

15. Restitution.

15. Restitution. A writ of restitution may be awarded when the judgment is reversed(*x*).
- Writ of. A writ of restitution does not lie to obtain re-possession of premises obtained possession of under a writ of *habere facias possessionem* which has been set aside; but the court in such a case will nevertheless award possession to be re-
- Order for.

(*n*) *Connor v. West*, 5 Burr. 2673: Runn. Forms, 395.

Eject. 432.

(*o*) *Doe Saul v. Dawson*, 3 Wils. 49.

(*p*) *Doe Upton v. Witherwick*, 3 Bing.

11; 10 Moore, 267, S. C.

(*q*) Runn. Eject. 434: Harr. L. & T.

867.

(*r*) 3 G. 1, c. 15, s. 16: see *ante*, Vol. I. 416.

(*s*) See form of attornment, Chit.

(*t*) Run. Eject. 424: 2 Sellon, 121: *ante*, 731, 732. But in *Doe Stephens v. Lord*,

Q. B., 25th Nov. 1837, *Patteson, J.*, doubted the correctness of this position. (6 Dowl. 256; 2 Nev. & P. 606).

(*u*) *Doe Stanfield v. Shipley*, 2 Dowl. 408.

(*x*) 2 Lil. Pr. Reg. 777. See form, Chit. Forms, 125.

stored (*y*). Where a judgment irregularly obtained was set aside, and the possession that had been given upon the execution ordered to be restored; but from the lessor of the plaintiff, who held the possession, having absconded, the rule became ineffectual—restitution was awarded (*z*).

The order to restore possession on setting aside judgment should be directed in the first instance to the lessor of the plaintiff. In a late case, where the defendant obtained a judge's order, setting aside a judgment irregularly obtained, and commanding the sheriff to restore possession, the court held, that the order should have been on the lessor of the plaintiff and not on the sheriff, and set aside writs of restitution sued out on the order, together with so much of the order as was directed to the sheriff (*a*).

The Order should be directed to the Lessor of the Plaintiff.

16. *Scire Facias*.

If the plaintiff neglect to sue out his execution for a year and a day after judgment, he must, in general, revive the judgment, as in other cases, else the court will award a restitution *quare erronee emanavit* (*b*); and when the judgment is against the casual ejector the terretenant must be joined in the writ (*c*).

16. *Scire Facias*.
After a Year and a Day.

If the plaintiff where he is a *real person*,—but this is rarely ever the case,—die after judgment, his executors cannot take out execution without a *scire facias*, for they are not parties to the judgment; though if execution has been regularly issued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the court, and not from the party (*d*). If the lessor of the plaintiff die after the *teste* of the writ of *habere*, but before it is actually sued out, it is not necessary to revive the judgment by *scire facias*; and as he is not a party on the record, it seems no *scire facias* would be necessary if he died before the *teste* of the writ, although this appears doubtful (*e*). If a sole defendant dies after judgment and before execution, it has been doubted whether a *scire facias* is necessary, because the execution is of the land only, and no new person is charged (*f*); but the safest course is to sue out a *scire facias* (*g*). The *scire facias* in such a case must be against the terretenants of the land, and not against the executor, without naming him terretenant (*h*). And as a *scire facias* for the land must issue against the terretenants, whoever they may be, it will also be necessary to sue out another *scire facias* for the costs against the personal representative, unless he be himself the terretenant.

After the Death of Parties.

If the judgment be against a *feme sole*, who marries before execution, an *habere facias possessionem* should be sued out in

After Marriage of Parties.

(*y*) *Doe Stevens v. Lord*, 6 Dowl. 256; 2 Nev. & P. 604; 7 A. & E. 610, S. C.

(*z*) 2 Sellon, Pract. 204; Harr. L. & T. 868.

(*a*) *Doe v. Williams*, 2 A. & E. 381; 4 Nev. & M. 259, S. C.; see the notes in 4 Nev. & M. 259.

(*b*) *Post*, Ch. 3: Harr. L. & T. 868: *Doe v. Lord*, 2 Nev. & P. 604. See the form, Chit. Forms, 124.

(*c*) *Withers v. Harris*, Lord Raym. 806: Ad. Eject. 346.

(*d*) Run. Eject. 429; Harr. L. & T. 2nd ed. 808.

(*e*) *Doe Beyer v. Roe*, 4 Burr. 1970.

(*f*) *Per Holt, C. J.*, in *Withers v. Harris*, Lord Raym. 806: *sed vide Procter v. Johnson*, 2 Salk. 600; Lord Raym. 669, S. C.

(*g*) Ad. Eject. 346.

(*h*) 2 Sellon, 204.

the maiden name of the defendant for the land, and a *scire facias* should be issued against the husband and wife for the costs (*k*).

SECT. 2.

Proceedings in Ejectment, upon a Vacant Possession.

Entry with-
out Action.

WE have already observed, that where a person has a right of entry, he may, if the premises be unoccupied and vacant, in a peaceable manner, and without using such force as would amount to a forcible entry, enter and take possession of them without bringing an ejectment; though, in most cases, it is best to proceed by ejectment (*l*).

What a vacant
Possession.

What a vacant Possession.] Where there is no tenant upon the premises, as observed in a recent valuable Work (*m*), a distinction must be taken between cases where the tenant has actually *abandoned* the possession, and where, although he has *discontinued to occupy* the premises, he has still retained the virtual possession of them (*n*). In the former case, the landlord *must* proceed in the ejectment as upon a vacant possession (*o*); in the latter case he must proceed in the ordinary way, after having effected the best service of the declaration in his power. Nice distinctions are drawn as to what is a *vacant* possession. Where the tenant of a house locked it up, and quitted it, it was held, that the landlord should treat it as a vacant possession (*p*). Where the lessee of a public-house took another, and removed his goods and family, but left beer in the cellar, it was held that a proceeding as on a vacant possession was incorrect, because the lessee still continued in possession; and a case was mentioned, where leaving hay in a barn was held to be keeping possession: it, however, appeared in the latter case, that the attorney for the plaintiff knew whither the lessee had removed, and might have served him personally, which could not be done on the premises. In the case of land, to which there is no house or barn, being rented, if it be known where the tenant lives, he must be served (*q*). Where a servant of the deceased tenant remains in possession, the plaintiff ought to endeavour to get possession; and, if he resists, such servant may be treated as tenant, and the declaration may be served on him as such; and, if he does not resist, it seems that the lessor may treat it as a vacant possession (*r*). Service on the executors of the late tenant in possession is bad, if it does not appear that they were the tenants in possession (*s*). A labourer who does not pay rent, has been held to be an occupier, on whom service

(*k*) *Doe Taggart v. Butcher*, 3 M. & Selw. 557.

(*l*) *Ante*, 731.

(*m*) Mr. Harrison's edition of Woodfall's Law of Landlord & Tenant, 827.

(*n*) See *Doe Hindle v. Roe*, 6 Dowl. 393; *Doe Burrows v. Roe*, 7 Dowl. 326.

(*o*) See *Doe Schowell v. Roe*, 3 Dowl.

691; 2 C., M. & R. 42, S.C., *nom. Doe Showell v. Roe*; *Doe Norman v. Roe*, 2 Dowl. 399, 428; *Doe v. Roe*, 4 Dowl. 173.

(*p*) *Doe Dartington (Lord) v. Cock*, 4 B. & C. 259; Harr. L. & T. 827.

(*q*) *Savage v. Dent*, 2 Str. 1064.

(*r*) *Doe Atkins v. Roe*, 2 Chit. 179.

(*s*) *Doe Paul v. Hurst*, 1 Chit. 162.

of an ejectment is good(*t*). Where the premises consisted of a mansion, and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access, in one of which small houses resided a man, who was permitted to live there merely to take care of them and the mansion-house, the rest of the messuages being vacant, the court refused a motion to make service on him good, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it should be deemed good service(*u*).

CHAF. I.
SECT. 2.

The plaintiff in an ejectment on a vacant possession should, in general, be more strict in his proceedings than in a contested possession(*x*).

Entry, Lease, Ouster, &c.] In order to maintain ejectment on a vacant possession(*y*), an actual entry must first be made upon some part of the premises in question. This must be done either by the lessor of the plaintiff himself, or by some person authorized by him for that purpose by a letter of attorney(*z*). A subsequent authority, by a letter of attorney, would, it seems, suffice(*a*).

Entry, Lease,
Ouster, &c.

By whom.

When the lessor, or his agent authorized by power of attorney, goes for the purpose of making the entry, he should be accompanied by two friends; and, having made the entry upon the premises, let him there execute a lease of them (previously prepared) to one of his friends, and put him immediately in possession; the other friend is then to enter upon the premises, and thrust the lessee out; whereupon, this second lessee, the ejector, is immediately served with a declaration in ejectment, (also previously prepared), in which he is made defendant, and the other friend plaintiff. All this should be done before the first day of the term; otherwise, you cannot move for judgment during that term(*b*). It may be necessary to mention, that an attorney cannot be lessee in this case(*c*).

How.

If the premises in question be a house merely, and the door be locked, in such a case, getting upon the threshold of the door, and putting his finger into the key-hole, will be a sufficient entry upon the part of the lessor or his attorney, if none better can be made without force. Where there was no key-hole, laying hold of an iron bar attached to the door was held sufficient(*d*).

What a sufficient Entry.

Judgment.] In this action of ejectment upon a vacant possession, no person claiming title can be let in to defend, but

Judgment.

(*t*) *Gulliver v. Smith*, 2 Ld. Ken. 511.

(*u*) 1 Tidd's Prac. 443. See the above cases collected in Harr. L. & T. 827.

(*x*) See *Anon.* 2 Chit. Rep. 188. In that case, the plaintiff, having obtained judgment, neglected to take away the rule until after two days after the term in which the judgment was obtained; and the court refused to assist him in the next term.

(*y*) As to what is, see *ante*. 770.

(*z*) See form of letter of attorney, Chit. Forms, 396; and of affidavit of execution of, *Id*.

(*a*) See Co. Lit. 245. a., 250. a.: *Fitchet v. Adams*, 2 Sir. 1128, where it was held, that a subsequent assent before the day of the demise was sufficient *without deed or writing* to take advantage of a condition. (*Maclean v. Dunn*, 1 Moo. & P. 770; 4 Bing. 722, S. C.)

(*b*) See form of lease, Chit. Forms, 396; of declaration and notice to appear, *Id*. 397.

(*c*) R. M., 1654, s. 1: *Hawkins v. Mag-nell*, 2 Doug. 466: Vol. I. p. 48.

(*d*) *Doe Frith v. Roe*, 2 Dowl. 451.

he that can first seal a lease upon the premises must obtain possession (*e*); and persons having any claim or title to them must have recourse to their action. Consequently, the lessor of the plaintiff may immediately proceed to judgment against the defendant. For this purpose, *make an affidavit of the entry, lease, and ouster, and of the service of the declaration and notice (f); annex to it the letter of the attorney, the lease, and a copy of the declaration and notice; and let the affidavit be sworn before a judge or a commissioner. Indorse it "to move for judgment against the defendant," and get it signed by counsel; draw up the rule, and proceed to sign judgment as directed ante, 722; then sue out execution (g). If the lease were executed by power of attorney, there must also be an affidavit of the execution of such power (h). In the Common Pleas the affidavit of the entry, lease, and ouster, &c., is unnecessary; and in that court the practice is for the plaintiff, at first, to give a rule to plead, as in ordinary cases, and at the expiration of the time for pleading, if there be no appearance and plea, he may sign judgment.*

See stat. 11 G. 2, c. 19, s. 16, & 57 G. 3, c. 52, which give a power to two justices of peace, when premises are deserted by a tenant, and no sufficient distress is to be found upon them to answer the arrears of rent, to give possession of them to the landlord (*i*).

SECT. 3.

Proceedings in Ejectment by Landlord, for Forfeiture by Non-payment of Rent (k).

1. *Where there is a sufficient Distress upon the Premises, 772.*

2. *Where there is not a sufficient Distress upon the Premises.*

Statute relating to, 774.

Search for Distress, id.

Declaration, and Service of, 774.

Judgment against the Casual Ejector, 775.

Appearance and subsequent Proceedings, id.

Tender of Rent — Bill in Equity, &c., id.

1. Where there is a sufficient Distress upon the Premises.

1. *Where there is a sufficient Distress upon the Premises.*

If the tenant forfeit his term by the non-payment of rent, the landlord may proceed to recover possession of the pre-

(*e*) Bull. N. P. 95.

(*f*) See form, Chit Forms, 397.

(*g*) Id. 398, &c.

(*h*) See the form, Chit. Forms, 376; see also the form of rule for judgment against defendant, Id.; of the *vacapce* for appearance, Id.; of the judgment, and of the writ of possession, Id.

(*i*) See *Ex p. Pilton*, 1 B. & Ald. 369; *Basten v. Carew*, 5 D. & R. 558; 3 B. & C. 612, 641, S. C.; *Lister v. Brown*, 3 D.

& R. 501; 1 C. & P. 121, S. C.

(*k*) It is unnecessary to notice particularly the cases in which a right of re-entry is reserved to the landlord, where the tenant is guilty of a breach of covenant, by not repairing, &c. In such cases, an actual entry is not necessary to enable the landlord to take advantage of the forfeiture. (*Oates v. Brydon*, 3 Burr. 1897). The proceedings are the same as in ordinary cases.

mises by ejectment (*l*). The mode of proceeding, however, varies, according as there is or is not a sufficient distress upon the premises to answer the amount of the rent due: if there be not a sufficient distress upon the premises, the proceeding may be under the stat. 4 *G.* 2, c. 28, s. 2; if there be a sufficient distress, the proceeding must be at common law (*m*). The proceeding at common law shall be first considered.

Before you commence the action, and, indeed, before the forfeiture can be incurred, a demand must have been made of the rent (*n*); unless there be an express stipulation or agreement between the parties dispensing with such demand (*o*). There is a great strictness required in this respect; for the common law does not favour forfeitures. The demand must be made, in fact, although no person be present on the part of the tenant to answer (*p*). The landlord must go in person, or execute a formal power to another, who must go in person (*q*). If the lease do not specify where the rent is to be paid, the demand must be made upon the land, and at the most notorious place of it; and, therefore, if there be a dwelling-house upon the land, the demand must be made at the front door of it: but it is not necessary to enter the house. Yet if the tenant were to meet the lessor on or off the land, at any time on the last day given him to pay the rent, and then tender him the rent, it would be sufficient to save the forfeiture (*r*). If the lease, however, specify a place for the payment of the rent, the demand must be made at that and no other (*s*). Also, the demand must be made precisely on the last day on which it can be paid to save the forfeiture; as, where the proviso in the lease is, that, if the rent be behind and unpaid for the space of twenty days, the lessor may re-enter, the demand must be made on the twentieth day, at some convenient time before sunset (*t*); or according to a dictum of Lord *Tenterden*, C. J., at sunset (*u*); a demand at one o'clock in the day will not do (*u*). And, lastly, the demand must be made of the precise sum due, and not a penny more or less (*x*). Where the rent was payable quarterly, and more than one quarter was due, it was held, that only a quarter's rent should have been demanded (*y*). If the rent be not paid when thus demanded, the tenant forfeits his term, and the landlord may re-enter for the forfeiture; that is, he may bring an ejectment to recover the possession of the premises; for an actual entry is not necessary in this case (*z*).

Demand of the Rent, when, where, and how made at Common Law.

The proceedings in this ejectment are the same as in ordinary cases, as described in the preceding two sections, according as the tenant is in possession, or the possession is vacant.

Other Proceedings.

(*l*) He may also, as we have seen *ante*, 731, 732, obtain possession without an ejectment, if the premises be vacant, &c.

(*m*) *Doe Forster v. Wandlass*, 7 T. R. 117: *Doe Chandless v. Robson*, 2 C. & P. 245.

(*n*) Bro. Abr., Demaunde, pl. 19.

(*o*) *Doe Harris v. Masters*, 2 B. & C. 490; 4 D. & R. 45, S. C.: *Goodbright v. Cator*, 2 Doug. 486.

(*p*) *Kidwelly v. Brand*, Plowd. 70 a, b.

(*q*) *Doe West v. Davis*, 7 East, 363.

(*r*) Co. Lit. 201. b., 202. a.: *Doe Forster v. Wandlass*, 7 T. R. 117: *Duppa v. Mayo*, 1 Saund. 287.

(*s*) Co. Lit. 202. a.

(*t*) Co. Lit. 202. a., and note 3: *Hill v. Grange*, Plowd. 172 b: *Duppa v. Mayo*, 1 Saund. 287.

(*u*) *Doe Wheeldon v. Paul*, 3 C. & P. 613.

(*x*) *Fabian & Windsor's case*, 1 Leon. 305: *Fabian v. Winston*, Cro. El. 209: *Doe Wheeldon v. Paul*, 3 C. & P. 613.

(*y*) *Doe Wheeldon v. Paul*, 3 C. & P. 613.

(*z*) *Anon.*, 1 Vent. 248: *Little v. Heaton*, 2 L. Raym. 750; 1 Salk. 259, S. C.: *Clerke v. Pywell*, 1 Saund. 319: *Duppa v. Mayo*, Id. 287.

BOOK III.
PART I.Difficulties of
proceeding at
Common Law.

This mode of proceeding upon a forfeiture for non-payment of rent, when there is a sufficient distress upon the premises, is seldom, however, adopted in practice: first, on account of the great nicety to be observed in the previous demand of the rent; and secondly, because the tenant, by filing a bill in equity, may obtain an injunction, and stay the proceedings, upon payment of the rent in arrear.

2. *Where there is not a sufficient Distress upon the Premises.*2. Where there
is not a suffi-
cient Distress
upon the
Premises.
Statute as to.

Statute as to.] If a term be forfeited by the non-payment of rent, and there be not a sufficient distress upon the premises (*a*), the proceedings in an ejectment by the landlord for the recovery of the possession in such a case are regulated by stat. 4 G. 2, c. 28; by which it is enacted, that in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, (*i. e.* where, by the express terms of the lease, a right of re-entry has been reserved (*b*)), such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, and recover therein, provided no sufficient distress was to be found on the premises to countervail the arrears of rent; and unless the tenant pay the rent and costs within six calendar months, he is to be deprived of all relief at law or equity, and the tenancy is absolutely determined (*s. 2*). Although the lease expressly requires a lawful demand, no demand is necessary to proceed under this act; the service of the declaration is substituted for such demand (*c*).

Search for
Distress.

Search for Distress.] Before proceeding under this act you must make diligent search over the premises, after the expiration of the time limited for payment of the rent, to ascertain the insufficiency of the property there to answer distress, and you will have to prove such search at the trial (*d*). But if the tenant prevented the search, that would supersede the necessity for it (*e*).

Declaration,
and Service
of.

Declaration, and Service of.] The declaration is the same as in ordinary cases. The demise must be laid on a day when the forfeiture was complete, and on or after a day when it is certain there was not sufficient property to distrain upon (*f*). If the possession be vacant, the notice is signed by the plaintiff's attorney, and directed to the tenant late in possession (*g*). If the tenant be in the occupation of the premises, the declaration and notice are served in the same manner as directed

(*a*) *Doe Forster v. Wandlass*, 7 T. R. 117; *Doe Chandless v. Robson*, 2 C. & P. 245.

(*b*) Woodf. L. & T. 2nd ed. 523: Chit. Col. Stat. 673, n. (*k*).

(*c*) *Doe Schofield v. Alexander*, 2 M. & Sel. 525; *Doe Lawrence v. Shawcross*, 3 B. & C. 752; 5 D. & R. 711, S. C.

(*d*) See *Doe Forster v. Wandlass*, 7 T. R. 117; *Rees v. King*, Forrest, Rep. 19.

(*e*) *Doe Chippendale v. Dyson*, 1 M. &

M. 77.

(*f*) *Doe v. Fuchau*, 15 East, 286; *Doe Lawrence v. Shawcross*, 3 B. & C. 752; 5 D. & R. 711, S. C.

(*g*) See form of declaration and notice where the premises are tenanted, Chit. Forms, 398; and of affidavit of service thereof, Id.; of declaration and notice upon a vacant possession, Id. 399; and of affidavit of service thereof, Id.

ante, 736—743. But if “the same cannot be legally served (*h*), or no tenant be in actual possession of the premises, then the same may be affixed upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof; which service, or affixing such declaration, shall stand in the place and stead of a demand and re-entry” (*i*). The court must be well satisfied that there is no probability that the tenant can be personally served before they will deem such affixing to be legal service (*k*).

Judgment against casual Ejector.] If the tenant take no steps to have himself made a party to the suit, the plaintiff may then proceed to obtain judgment against the casual ejector, as in ordinary cases. In order to this—*Let an affidavit (k) be made of the service or affixing of the declaration and notice, and also stating that “half-a-year’s rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors had power to re-enter” (l). The affidavit must be positive as to there being no sufficient distress (m). Annex this affidavit to the declaration, move upon it for judgment against the casual ejector, draw up the rule, and sign judgment, as directed ante, 745, 746.* Which judgment shall have the same effect, and the plaintiff may thereon sue out execution in the same manner, “as if the rent had been legally demanded, and a re-entry made” (*n*).

Judgment
against casual
Ejector.

Appearance and Subsequent Proceedings.] The appearance, plea, and other proceedings to trial, &c., are the same as already mentioned in the first section. At the trial, however, the plaintiff, in addition to what in other cases he would have to give in evidence, must prove “that half-a-year’s rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter” (*o*).

Appearance,
and subse-
quent Pro-
ceedings.

We have seen that, at the trial, the plaintiff, on proving the mesne profits, may recover them as damages (*p*).

Mesne Pro-
fits.

Tender of Rent—Bill in Equity, &c.] If the tenant or his assigns shall, at any time before the trial (*q*), pay or tender to the landlord, his executors, &c., or pay into court, all the rent in arrear, together with costs, all further proceedings shall cease (*r*). The mortgagee of the term is an assignee within the act (*s*). The application may be to the court in

Tender of
Rent—Bill in
Equity, &c.

(*h*) *Doe v. Pugh v. Roe*, 1 Scott, 464; 1 Hodges. 6. S. C.

(*i*) 4 G. 2, c. 28, s. 2.

(*k*) The act requires this affidavit. After judgment and execution it will be presumed that the affidavit was made. (See *Doe v. Lewis*, 1 Burr. 614.) It may be made by a third party. (*Doe Charles v. Roe*, 3 Moo. & Sc. 751; 2 Dowl. 752, S. C.)

(*l*) 4 G. 2, c. 28, s. 2.

(*m*) *Doe v. Roe*, 2 Dowl. 413.

(*n*) 4 G. 2, c. 28, s. 2.

(*o*) *Id.*: see *Doe v. Lewis*, 1 Burr. 614.

(*p*) *Ante*, 759: post, 782.

(*q*) See *Roe West v. Davis*, 7 East, 63; *Goodtitle v. Holdfast*, 2 Str. 900; *Doe Harris v. Masters*, 4 D. & R. 45; 2 B. & C. 490, S. C.

(*r*) 4 G. 2, c. 28, s. 4.

(*s*) *Doe Whitfield v. Roe*, 3 Taunt. 402; *Ad. Eject.* 214, S. C.: *ante*, 752.

term time, or to a judge in vacation(*t*). By consent, the court or a judge will, even after execution executed, stay the proceedings, &c., on payment of the rent and costs(*u*). The rent to be paid must, it seems, be calculated only to the last rent-day, and not to the day of computing(*v*). The application may be made though the ejectment be not wholly brought under the act; and in such case the court will grant it, reserving, however, to the plaintiff the liberty of proceeding on any other title(*x*). Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them; and the defendant moved to stay the proceedings, on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring an ejectment as executors; and there appearing to be a mutual debt due to the defendant by simple contract, the defendant offered to go into the whole account, taking in demands both as devisees and executors, saving just allowances; which the lessors of the plaintiff refused: the rule was made absolute to stay the proceedings, on payment of the rent due to the lessors as devisees, and costs(*y*). Where the rent was tendered before notice of the action, the proceedings were set aside for irregularity; and the landlord having given directions respecting the matter to his attorney, it was held to amount to nothing(*z*).

Or the defendant may apply to a court of equity for relief, either before or after trial.

Consequence
of not tender-
ing Rent or
Filing Bill
in time.

But in case the lessee, his assignee, or other person claiming or deriving under the said lease, shall suffer judgment to be recovered on such ejectment, and execution to be executed thereon, without paying the rent in arrear, together with full costs, and without filing any bill for relief in equity within six calendar months after such execution executed; then and in such case the said lessee, &c., shall be barred or foreclosed from all relief in law and equity, (other than by writ of error, if the judgment be erroneous), and the landlord or lessor shall thenceforth hold the said demised premises discharged from such lease(*a*).

(*t*) Ca. Pr. C. B. 6: 2 Sellon, 127.

(*u*) Harr. L. & T. 844. See *Doe Lambert v. Roe*, (3 Dowl. 557), where *Williams, J.*, refused to set aside the proceedings after execution executed, where there were other grounds of forfeiture besides the non-payment of rent.

(*v*) *Doe Harcourt v. Roe*, 4 Taunt. 883.

(*x*) Bull. N. P. 97.

(*y*) 2 Sel. Prac. 211: *Duckworth d. Tubley v. Tunstall*, Barnes, 184.

(*z*) *Goodright Stevenson v. Norright*, 2 W. Bl. 747.

(*a*) 4 G. 2, c. 28, s. 2: see *Doe Hitchins v. Lewis*, 1 Burr. 614; 2 Ld. Ken. 320, S. C.

SECT. 4.

Proceedings in Ejectment by Landlord, under Stat. 1 G. 4, c. 87, upon the Determination of a Tenancy (a).

To what Cases the Statute applies, 777.

Demand of Possession, 778.

Declaration and Notice, id.

Bail, id.

Judgment against Casual Ejector,

780.

Appearance and Plea, 781.

Issue, &c., id.

Trial, &c., id.

Staying Execution, &c., 782.

To what Cases the Statute applies.] THE mode of proceeding given by the stat. 1 G. 4, c. 87 may be adopted in all cases "where the term or interest of any tenant, holding, under a lease or agreement in *writing*, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined, either by the landlord or tenant by regular notice to quit (*b*); and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made thereof." A tenant in common may proceed under the act for the recovery of his undivided moiety (*c*). The act does not, it seems, extend to cases where the tenant *bonâ fide* disputes the landlord's title; as if the tenant claim the premises as heir-at-law, or the like (*d*). A holding for three months certain is a tenancy for a term within the meaning of the act (*e*). So is a mere agreement in writing for a lease for a term certain, and a holding over beyond that term (*f*). In the case of lessee and under-lessee, the lessee is a landlord within the statute (*g*). But a tenancy for years determinable on lives is not (*h*). And the statute only applies where there was a term certain, and the lease has expired by effluxion of time, or a tenancy from year to year, determined by regular notice to quit, and not to the middle case of a term for fourteen years, determinable by notice at the end of the first seven, and determined by such notice accordingly (*i*). The holding must have been under a lease or agreement in writing; and therefore, where a tenant held from year to year, under a letting by parol, it was holden not to be within the act (*j*). When a landlord allows his tenant to hold over above a year, without taking any steps to recover possession, a new tenancy from year to year being created, he is not entitled to the benefit of this act (*k*).

To what Cases the Statute applies.

A landlord, however, is not confined to the mode of proceeding given by this statute; but he may adopt it, or have recourse to the ordinary mode of proceeding laid down in the first section of this Chapter, *ante*, 733, &c., at his option (*l*).

(a) See as to obtaining possession by summary proceedings before justices, where the term does not exceed seven years, or the rent 20*l.*; and no fine has been reserved, 1 & 2 V. c. 74.

(b) *Doe Cardigan v. Roe*, 1 D. & R. 540.

(c) *Doe v. Rotheram*, 3 Dowl. 690.

(d) *Doe Saunders v. Roe*, 1 Dowl. 4.

(e) *Doe Phillips v. Roe*, 5 B. & Ald. 766; 1 D. & R. 433, S. C.

(f) See *Doe Marquis of Anglesey v. Roe*, 2 D. & R. 565.

(g) *Doe Watts v. Roe*, 5 Dowl. 513.

(h) *Doe Pemberton v. Roe*, 7 B. & C. 2.

(i) *Doe Cardigan v. Roe*, 1 D. & R. 540; *Doe Tindal v. Roe*, 1 Dowl. 143; 2 B. & Ad. 922, S. C.

(j) *Doe Bradford v. Roe*, 5 B. & Ald. 770; *Rees v. Thrustout*, M. Cl. 492; *Doe Thomas v. Field*, 2 Dowl. 542. See form of notice to quit, Chit. Forms, 357.

(k) *Doe Thomas v. Field*, 2 Dowl. 542.

(l) See 1 G. 4, c. 87, s. 7.

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And the landlord should be cautious in proceeding under this act, and requiring bail; for if he fail in the action, he will have to pay *double costs*(*m*).

Demand of Possession.

Demand of Possession.] This demand must be in writing, and “made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant, or person” holding or claiming by or under him(*n*). And if such tenant or person thereupon refuse to deliver up possession, the landlord may commence his ejectment(*o*).

Declaration and Notice.

Declaration and Notice.] The declaration is in the usual form(*p*); but at the foot thereof the landlord is to address a notice to such tenant or person, (*vide supra*), requiring him to appear in the court in which the action shall have been commenced, on the first day of the term(*q*) then next following, [or if the action shall be brought in the counties palatine of Lancaster or Durham respectively, then on the first day of the next session or assizes, or at the court day or other usual period for appearance, then next following, as the case may be], there to be made defendant, and to enter into a recognisance by himself and two sufficient sureties, in such sum as to the court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in the action, if the court shall so order(*r*). It must be signed by the landlord or his agent, and not in the name of Richard Roe, as in the notice in ordinary cases(*s*). A notice, signed A. B., agent for the plaintiff, instead of lessor of the plaintiff, and calling upon the tenant to appear and be made defendant, and find such bail, &c., “and for such purposes as are specified in the act of parliament,” without detailing them, is sufficient(*t*). A notice according to the statute “to appear in Trinity term next following” is bad; it should require an appearance on the first day of term(*u*). In practice, it is usually added after the notice by the casual ejector; but there seems to be no necessity for both notices, as this notice comprises the whole of the substance of the other.

The declaration is served in the manner directed *ante*, 736 to 743.

Bail.

Bail.] “Upon the appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of the service of the declaration and notice(*v*), it shall be lawful for the landlord (producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been

(*m*) 1 G. 4, c. 87, s. 6, *post*, 782.

(*n*) *Id.* s. 1: see *Doe Marquis of Anglesey v. Roe*, 2 D. & R. 565. See form where tenant held under a lease, *Chit. Forms*, 400; the like where he held from year to year, *Id.*

(*o*) See 1 G. 4, c. 87, s. 1.

(*p*) See *ante*, 733. See the forms, *Chit. Forms*, 400.

(*q*) See *Doe Holder v. Rushworth*, 4 M. & W. 74; 6 Dowl. 712, S. C.

(*r*) 1 G. 4, c. 87, s. 1. See form of notice, *Chit. Forms*, 400.

(*s*) *Anon.*, 1 D. & R. 435; *Goodtitle v. Nottile*, 5 B. & Ald. 849; 6 Moore, 56 a. See a form, *Tidd's Forms*, 623.

(*t*) *Doe Beard v. Roe*, 1 M. & W. 360. See form, *Chit. Forms*, 400.

(*u*) *Doe Holder v. Rushworth*, 4 M. & W. 74; 6 Dowl. 712, S. C.

(*v*) *Ante*, 743.

determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid) to move the court for a rule for such tenant or person to shew cause, within a time to be fixed by the court on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, [or if the action shall be brought in the counties palatine respectively, then of the session, assizes, or court day, as the case may be, at which the trial shall be had], and also why he should not enter into a recognisance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the court, upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings, and find such bail, with such conditions, and in such manner, as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff" (x).

In order to proceed under this act, make a motion to the court for a rule to shew cause why the tenant should not give the undertaking and enter into the recognisance above mentioned, and why in default thereof the plaintiff should not be at liberty to sign judgment against the casual ejector (y). The motion must be made on production of the original or a counterpart or duplicate of the lease or agreement properly stamped; and it is not sufficient to move on a copy, or an instrument unstamped at the time of the motion, though it be stamped after the rule nisi and before cause shewn (z). It may be made by one of several tenants in common (a).

The Motion,
by whom and
how made.

The motion should be founded upon the affidavit described by the act (b). It is advisable that the affidavit should state the annual value of the premises, so that the court may be enabled to fix the sum for which the security should be given (c). It should shew that the tenancy, if from year to year, has been determined by a "regular" notice to quit (d). It seems not to be necessary that the attesting witness should depose to the execution of the lease if it be sufficiently proved by other witnesses (e). Where an attorney who was the attesting witness to the counterpart afterwards became the

The Affidavit.

(x) 1 G. 4, c. 87, s. 1.

(y) Chit. Sum. Pract. 230.

(z) See *Doe v. Roe*, 2 Dowl. 180.

(a) *Doe Caufield v. Roe*, 3 Bing. N. C. 327; 5 Dowl. 365, S. C.; see *Doe Holder v. Rushworth*, 4 M. & W. 74. but see *Doe v. Roe*, 1 D. & R. 433, cont.

(b) *Doe Morgan v. Rotheram*, 3 Dowl. 690; *Doe Gowland v. Roe*, 6 Dowl. 35; see

vide per Williams, J., in *Doe Avery v. Roe*, 6 Dowl. 521.

(c) See form of affidavit, where the tenant held under a lease, Chit. Forms, 401; the like, where he held from year to year, Id. 402; and of rule nisi thereon, Id. 403. And see Chapman's Pract. 210.

(d) *Doe Topping v. Boast*, 7 Dowl. 407.

(e) Chit. Sum. Pract. 230.

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attorney of the tenant, the court, notwithstanding, compelled him to prove the execution of the counterpart in support of the application; on the ground that, if a person becomes willingly a party to the execution of an instrument, he ought not, because he subsequently becomes the partisan of another, by being his attorney, or because he is out of humour, to be allowed to frustrate the remedy which a third person has on the instrument (*f*).

The Rule.

It is not necessary to express in the rule the amount of the security required (*g*). *Draw up the rule, and serve a copy of it upon the tenant in possession, either personally, or by leaving it for him at his most usual place of abode. On the day appointed for shewing cause, move to make the rule absolute on an affidavit of service (h).* The time within which the undertaking is to be given, and the recognisance entered into, as required by the act, is fixed by the court in this rule absolute (*i*). In one case the Court of Common Pleas, on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognisance in a reasonable sum conditioned to pay the costs and damages which should be recovered by the plaintiff in the action, ordered the tenant to appear in the next succeeding term to find such bail as were specified in the former rule; and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute (*k*). Usually bail is required for a sum sufficient to cover a year's value and 40% for costs (*l*). *Draw up the rule, and serve it in the same manner as the rule nisi.*

Bail, how put in.

Bail is put in, and the recognisance taken, in nearly the same manner as in ordinary cases (*m*); except that the tenant himself must join in the recognisance (*n*); but he cannot be examined as to his sufficiency (*o*). The recognisance should be entitled in the cause against the real defendant (*p*). The officer of the court with whom the recognisance is filed, is to file it on payment of 2s. 6d. It must be put in suit in six months after the landlord has obtained possession (*q*).

Undertaking.

The undertaking mentioned in the statute is included in the consent rule (*r*).

Judgment against the casual Ejector.

Judgment against the casual Ejector.] If the tenant put in bail, except to them or not (*s*), as in ordinary cases, in order to compel a justification (*t*). And if he fail to justify his bail, or if no bail be put in, or the defendant have not entered into the consent rule, with the undertaking above mentioned, within the time given by the court for that purpose, then, *if it was part of the rule for the required bail, that, in default of their*

(*f*) *Doe Avery v. Roe*, 6 Dowl. 518.

(*g*) *Doe Phillips v. Roe*, 5 B. & Ald. 766; 1 D. & R. 433, S. C.: *Doe Gowland v. Roe*, 6 Dowl. 35.

(*h*) See form of the affidavit of service, Chit. Forms, 404; and see the form of the rule absolute, Id. 404.

(*i*) See *Doe Angelsea v. Brown*, 2 D. & R. 688; 3 D. & R. 236, S. C.

(*k*) *Doe Sam son v. Roe*, 6 Moore, 54.

(*l*) *Quare*, as to mesne profits. (See Id.)

(*m*) See 1 G. 4, c. 87, s. 4.

(*n*) Id. s. 1.

(*o*) *Semb.*: see *Keane v. Deardon*, 8 East, 298. See the forms, Chit. Forms, 406; see also the form of the notice of filing the recognisance, Id. 407.

(*p*) *Doe Durant v. Moore*, 6 Bing. 656; 4 Moo. & P. 531, S. C.

(*q*) 1 G. 4, c. 87, s. 7.

(*r*) See form, Chit. Forms, 408.

(*s*) See form of notice of exception, Chit. Forms, 407.

(*t*) *Ante*, Vol. I. 585, &c.

being put in, &c., the plaintiff might sign judgment, &c., sign it accordingly, and sue out the writ of possession as usual, and as directed ante, 747; or if the rule does not give the plaintiff this liberty to sign judgment, then upon affidavit of that fact, and of the service of the rule absolute above mentioned, you may move for judgment against the casual ejector; and the rule granted in such a case is a rule absolute in the first instance(u). This judgment is then signed, and the writ of possession sued out and executed, as directed ante, 747.

CHAP. I.
SECT. 4

Appearance and Plea.] Putting in and perfecting bail are not in this case, as in ordinary cases, an appearance of the tenant, but the tenant must also enter an appearance, and enter into the consent rule, as in ordinary cases. For this purpose—*Get a blank consent rule containing the undertaking above mentioned, at the rule office, and fill it up*(x); and let the tenant's attorney sign the rule, leaving room above his signature for that of the attorney for the plaintiff. Take this rule to one of the masters, and enter an appearance for the tenant, as directed ante, 749, and the master will thereupon mark the consent rule(y). Next engross the general issue upon plain paper(z), annex the rule to it, and deliver both to the opposite attorney(a). All this should be done before the expiration of the time limited for that purpose by the court. So, care must be taken to put in bail (and such bail seemingly as are required in error, see Vol. I. 365) within the same time; and if excepted to, they must be justified within the time limited for that purpose by the practice of the court, unless the court grant a further time to justify; otherwise the appearance and plea may be treated as a nullity, and the plaintiff may move for judgment against the casual ejector, as above directed.

Appearance
and Plea

Issue, &c.] When the time given to the tenant to put in bail, &c., has expired—*Let the plaintiff's attorney, after separating the plea from the rule, sign the latter, and take it to one of the masters, who will thereupon draw up the rule. Then, make up the issue on plain paper, as directed ante, 756(b); indorse upon it the notice of trial(c); annex a copy of the consent rule to it, and deliver it to the defendant's attorney.*

Issue &c.

Make up your Nisi Prius record(d); issue out jury process(d), enter your cause for trial, and deliver your briefs to counsel, as directed ante, 757.

Trial, &c.] If the defendant do not appear at the trial, and confess lease, entry, and ouster, the plaintiff is not to be nonsuit, as in ordinary cases of ejectment. But, by statute 1 G. 4, c. 87, s. 2, "wherever hereafter it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of lease, entry, and ouster, but the

Trial &c.

Where De-
fendant does
not appear.

(u) See the form of the affidavit and rule, Chit. Forms, 404.

(x) See the form, Chit. Forms, 408.

(y) See as to the form of *præcipe* for appearance, Chit. Forms, 371.

(z) See form, Chit. Forms, 371.

(a) R. G. H. 1433, Q. B.

(b) See forms, Chit. Forms, 408.

(c) See Chit. Forms, 378, 379.

(d) See form, Chit. Forms, 408.

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production of the consent rule and undertaking of the defendant shall, in all such cases, be sufficient evidence of lease, entry, and ouster."

The Damages.

Nor are the damages in this case, as in the ordinary cases of ejectment, merely nominal; for, by 1 G. 4, c. 87, s. 2, "the judge, before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff, on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

Double Costs
in case Land-
lord is de-
feated.

On the other hand, by sect. 6, "in cases wherein the landlord shall elect to proceed in ejectment, under the provisions hereinbefore contained, and the tenant shall have found bail, as ordered by the court, then, if the landlord, upon the trial of the cause, shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him, with double costs."

Staying Exe-
cution, &c.

[*Staying Execution, &c.*] By 1 G. 4, c. 87, s. 3, "in all cases in which such undertaking shall have been given, and security found as aforesaid, if, upon the trial, a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely till the fifth day of the term then next following, or till the next session, assizes, or court day (as the case may be); which order the judge shall in all other cases make, upon the requisition of the defendant, in case he shall forthwith undertake (e) to find, and on condition that within four days from the day of the trial he shall actually find security, by the recognisance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside,

(e) See form of recognisance, Chit. Forms, 407.

as the case may be." Under this section the defendant must give two *additional* sureties on bringing a writ of error, although he has already given the two sureties on his appearance, under the first section of the act (f). But, in such case, putting in and perfecting bail in error will discharge the intermediate recognisance (not to commit waste) given under Section 3.

CHAP. I.
SECT. 5.

SECT. 5.

Proceedings in Ejectment by Landlord, under 11 G. 4 & 1 W. 4, c. 70, ss. 36, 37.

The Statute and Cases within it.] THE 11 G. 4 & 1 W. 4, c. 70, s. 36, after reciting that "*landlords, to whom a right of entry into or upon any lands or hereditaments may accrue during or immediately after Hilary and Trinity terms respectively, are at present unable to prosecute ejectments against their tenants so as to try the same at the assizes immediately ensuing, whereby much delay is occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords;*" enacts, that "*in all actions of ejectment hereafter to be brought in any of his majesty's courts at Westminster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a declaration in ejectment, intitled of the day next after the day of the demise in such declaration, whether the same shall be in term or vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead (g) entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term; provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; provided also, that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his majesty's superior courts at Westminster, by summons in the usual manner, for*

(f) *Doe Durant v. Moore*, 6 Bing. 656; 4 Moo. & P. 531; 7 Bing. 124; 4 Moo. & P. 761; 1 Dowl. 203, S. C.

(g) It seems a rule to plead is not necessary. (See 2 Adams, Eject. 2nd ed. 222: ante, 746).

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time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes; and that it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient."

It will be observed, that this statute is applicable only to ejectments by *landlords*; also that the tenancy must expire, or the right of entry accrue, in or after *Hilary* or *Trinity* (*h*) terms; and therefore, if the tenancy expired, or the right of entry accrued, before the first day of either of those terms, the case would not fall within the statute (*i*). It also extends only to country ejectments triable at the *assizes*, and not to those of Middlesex or London (*k*).

Declaration
and Notice.

Declaration and Notice.] The declaration is in the usual form (*l*), except that it must be *intituled* of the day next after the day of the demise laid in such declaration, and this whether in term or vacation (*m*). At the foot of the declaration a notice should be added, requiring the defendant, within *ten* days, to appear and plead to it (*m*). In other respects this notice is the same as the usual notice, *ante*, 734.

How served.

The declaration is served in the manner directed *ante*, 736 to 743, except that the service must take place *within ten days* after the tenancy expired, or the right of entry accrued. (*See the statute, supra*).

Objection to
Service too
late at Trial.

An objection to the service, on account of its not having taken place within these ten days, cannot be taken at the trial (*n*); it is merely matter of irregularity.

Judgment
against the
Casual Ejec-
tor.

Judgment against the Casual Ejector.] If the tenant makes default in not appearing and pleading within ten days after the service of the declaration, (one day inclusive and the other exclusive), the plaintiff will be entitled to judgment against the casual ejector, and he should proceed in nearly the same manner as in other cases noticed *ante*, 736, &c. The practice as to the mode of obtaining such judgment is there noticed. The only main difference appears to be as regards the affidavit for that purpose, which is the same as usual, except that it states when the tenancy expired or right of entry accrued, and when the declaration was served, in order that the court may see that the proceedings are in accordance with the act (*o*).

Appearance
and Plea, &c.

Appearance and Plea, &c.] The practice as to these is the same as in ordinary cases, *mutatis mutandis* (*p*). A judge may grant an order for time to appear or plead as in other cases.

Other Pro-
ceedings.

Other Proceedings.] The plaintiff must give to the defendant six clear days' notice of trial (exclusive of the day it is given and the commission day) before the commission day of the assizes. It is not necessary to prove at the trial that this notice

(*h*) *Doe v. Roe*, 2 C. & J. 123; 1 Dowl. 304, S. C.

(*i*) *Doe Somerville v. Roe*, 4 Moo. & Sc. 747.

(*k*) *Doe Norris v. Roe*, 1 Dowl. 547.

(*l*) See *ante*, 733.

(*m*) 11 G. 4 & 1 W. 4, c. 70, s. 37. See the form, Chit. Forms, 410.

(*n*) *Roe Rankin v. Brindley*, 4 B. & Ad. 84; 1 Nev. & M. 1, S. C.

(*o*) See a form, Chit. Forms, 411.

(*p*) See *ante*, 749.

was given (*q*); and if not duly given, the defendant, by defending the action at the trial, will cure any objection on account of it (*q*).

CHAP. I.
SECT. 6.

The court or a judge, on summons, may, in their discretion, stay or set aside the proceedings, or postpone the trial until the next assizes. In support of the application, an affidavit of facts should be produced to induce the court or judge to grant it.

Notice of Trial.
Staying Proceedings.

In making up the record of the proceedings, the declaration may be intitled specially of the day next after the day of the demise laid in the declaration, and the judgment will not be avoided or reversed by reason only of such special title (*r*).

Declaration may be intitled specially in Record.

The rest of the proceedings are the same as in ordinary cases, *mutatis mutandis* (*s*).

SECT. 6.

Action for Mesne Profits.

THE action of trespass for mesne profits may be brought for the amount of the profits derived by the defendant from the premises recovered in ejectment; that is, for the amount of the yearly value of the premises, whilst he held them against the lessor's title.

Action for mesne Profits.

The action may be brought in the name either of the nominal plaintiff in the ejectment or of his lessor (*t*). A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his companion (*u*). A joint action for mesne profits may be maintained by several lessors of the plaintiff in ejectment after recovery therein, although the declaration in ejectment contained only a separate demise by each (*x*).

By whom it may be brought.

The action ought, in general, to be brought against the person against whom the judgment in ejectment is given (*y*). It has, it seems, been doubted, whether a tenant, whose under-tenant holds over after the expiration of his term, is liable for mesne profits; but, in practice, the former is often joined in the action with his under-tenant; and he appears to be liable, at all events, if he has expressly recognised the acts of his under-tenant, and has received rent from him for the period during which possession was improperly detained (*z*). And, in general, any person found in possession, after a recovery in ejectment, is liable to the action; and it is no defence that he was on the premises as the agent, and under the license of the defendant

Against whom.

(*q*) *Doe Antrobus v. Jephson*, 3 B. & Ad. 402. *Doe Rankin v. Roe*, 1 Nev. & M. 1; 4 B. & Ad. 84, S. C.

(*r*) See the statute, *ante*, 783.

(*s*) See *ante*, 731 to 769.

(*t*) *Aslin v. Parkin*, 2 Burr. 665; 1 Smith's Leading Cases, 264, S. C.

(*u*) *Goodtitle v. Tombs*, 3 Wils. 118; *Cut-*

ting v. Derby, 2 Bl. Rep. 1077.

(*x*) *Chamier v. Clingo*, 5 M. & Sel. 64; 2 Chit. Rep. 410, S. C.

(*y*) 1 Chit. Pl. 6th ed. 195.

(*z*) *Id.*: and see *per Mansfield, C. J.* in *Burne v. Richardson*, 5 Taunt. 720; *Roe v. Wiggs*, 2 New Rep. 330; *Ilbs v. Richardson*, 1 Per. & D. 618.

BOOK III.
PART I.

in ejectment, for no man can license another to do an illegal act (*a*). The defendant, however, in such a case, will only be liable for the mesne profits for the time he was in possession (*b*). The action cannot be maintained against executors or administrators for the profits during the lifetime of the testator or intestate, and received by him (*c*); except, indeed, for the profits received within six calendar months before the death of the testator or intestate, and then only if the action for them be brought against the executor or administrator within six months after they have taken upon themselves the administration of his estate (*d*).

Arres' for.

Previously to 1 & 2 V. c. 110, the defendant might have been holden to bail on a judge's order, which was seldom refused. But, since that act, he cannot be holden to bail, unless it be shewn to the satisfaction of the judge that the mesne profits amount to twenty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England (*e*).

What a Defence.

The defendant may plead the Statute of Limitations as to all the profits, excepting those which may have accrued within the last six years (*f*). But he cannot, it seems, plead a discharge under the Insolvent Act (*g*). Nor his bankruptcy, the demand being for unliquidated damages, which could not be proved under the commission (*h*). He was not, previously to the 3 & 4 W. 4, c. 42, s. 21, allowed to pay money into court (*i*). If he were defendant also in the ejectment, he cannot dispute the title of the lessor of the plaintiff, from the day of the demise laid in the declaration (*j*). But where he is not concluded by the record in ejectment, he may controvert the plaintiff's title (*k*). And in a late case, where, in an action for mesne profits in the name of the casual ejector, the defendant pleaded that the premises were not the plaintiff's, it was held that he might give evidence of title in himself, though he had suffered judgment by default in the ejectment; for the estoppel, to be conclusive, should have appeared on the record (*l*). The defendant cannot, under the general issue, give in evidence an acceptance by the plaintiff of the rent, and an agreement to waive the costs of the ejectment (*m*).

Security for Costs.

If the action be brought in the name of the nominal plaintiff, the court, upon application, will stay the proceedings until security be given for costs (*n*).

Amount of Damages.

The jury are not, in estimating the damages, confined to give the mere rent or annual value of the premises; but may give such extra damages as they may think fit, as a compensation for plaintiff's trouble, &c. (*o*). So, where the plaintiff has had

(a) 1 Chit. Pl. 6th ed. 195.

(b) 1 Woodf. L. & T. 7th ed. 419: Ad. Eject. 331: *Aslin v. Parkin*, 2 Burr. 668; Smith's Leading Cases, 264, S. C.: *Doe James v. Staunton*, 1 Chit. Rep. 121; 2 B. & Ald. 373.

(c) See 1 Chit. Pl. 6th ed. 195.

(d) 3 & 4 W. 4, c. 42, s. 2.

(e) 1 & 2 V. c. 110, s. 3: *Hunt v. Hudson*, Barnes, 85. See Vol. I. 497.

(f) Bull. N.P. 88.

(g) *Lloyd v. Peel*, 3 B. & Ald. 407.

(h) *Goodtitle v. North*, 2 Doug. 584.

(i) *Holdfast v. Morris*, 2 Wils. 115. See as to payment of money into court generally, *post*, Book IV. Part I. Ch. 9.

(j) See Adams on Eject. 333: *Charfield v. Parker*, 8 B. & C. 551, n. (a).

(k) Rosc. on Evid. 499.

(l) *Doe v. Huddart*, 2 C., M. & R. 16: and see *Vooght v. Winch*, 2 B. & Ald. 662.

(m) *Doe v. Leo*, 4 Taunt. 459.

(n) Bull. N.P. 89: *Pice v. Corbin*, Say, 78.

(o) *Goodtitle v. Tombs*, 3 Wils. 121: *Doe v. Hare*, 2 C. & M. 145; 4 Tyr. 29, S. C.

judgment against the casual ejector, he may recover his costs in this action, although not taxed, against the tenant or person last in possession (*p*); but if the ejectment were defended, and the taxed costs paid, the extra costs would not be recoverable (*q*). The plaintiff may recover, by way of damages, the costs incurred by him in a court of error, by reversing the judgment in ejectment erroneously obtained by the defendant (*r*). And the plaintiff is not restricted to the time stated in his demise in the declaration in ejectment, but may also recover the profits which accrued previously, if he had title to the premises at the time, and the defendant were in possession (*s*). The jury, however, are to give damages only for the time the defendant is proved to have been in actual possession (*t*), and since the plaintiff's title accrued. And where an actual entry has been made to avoid a fine, as above mentioned, the jury can give damages only as to the profits accruing since the time of the entry (*u*).

Ground-rent necessarily paid by the defendant while in possession should be deducted by the jury from the damages (*x*). And where an action for mesne profits was brought against a party who had a cross claim against the plaintiff at law for money expended on the land, the court of Equity Exchequer granted an injunction to stay the proceedings at law (*y*).

Mitigation of Damages.

If the action is brought pending a writ of error on the judgment in ejectment, the plaintiff may proceed to judgment; but the court will stay execution until the writ of error is determined (*z*).

Action pending Error.

If the plaintiff recover less than 40s., he shall, in general, have no more costs than damages, unless the judge certify (*a*).

Costs.

In all other respects, the proceedings in this action are the same as in ordinary cases.

Other Proceedings.

(*p*) *Gulliver v. Drinkwater*, 2 T. R. 261; *Doe v. Davis*, 1 Esp. 358; 6 T. R. 593, S. C.; *Doe v. Huddart*, 2 C. M. & R. 316; *Symonds v. Page*, 1 C. & J. 29; *Goodtitle v. Tombs*, 3 Wils. 121; Bull. N.P. 88, 89; and see *Hunter v. Britts*, 3 Camp. 455.

(*q*) *Gulliver v. Drinkwater*, 2 T. R. 261; *Doe v. Davis*, 1 Esp. 358; *Brooks v. Bridges*, 7 Moore, 471; *Doe v. Hare*, 2 Dowl. 245. *Quære*, if the extra costs would be recoverable in any form of action. (See 1 Camp. 151; 4 Taunt. 7; 4 Bing. 160.)

(*r*) *N well v. Roake*, 7 B. & C. 404; 1

M. & R. 170, S. C.

(*s*) Bull. N. P. 87.

(*t*) *Stanyngought v. Corins*, Barnes, 456; ante, 786.

(*u*) See *Compere v. Hicks*, 7 T. R. 727; and see *Berrington v. Parkhurst*, 2 Str. 1006. 4 Brown, P. C. 353.

(*x*) *Doe v. Hare*, 2 C. & M. 145; 4 Tyr. 29. S. C.

(*y*) *Earl Cawdor v. Lewis*, 1 Y. & Col. 427.

(*z*) Ca. Pr. C. B. 46.

(*a*) *Doe v. Davis*, 1 Esp. 358; 6 T. R. 593, S. C.

CHAPTER II.

REPLEVIN.

SECT. 1. *The Distress*—788 to 792.2. *Replevin*—792 to 814.

SECT. 1.

*The Distress.**How made, &c., 788.
Inventory and Notice, 789.**Removal of the Goods, 789.
Appraisement and Sale, 790.*BOOK III.
PART I.

How made.

How made.] A DISTRESS for rent (to which these few observations shall be confined) is made by entering upon the premises (*a*) and seizing any piece of furniture or chattel distrainable, saying, at the same time, that you seize that in the name of all the chattels upon the premises, to the value of the rent distrained for (*b*), and stating the cause of the distress particularly; and if the distress be made by virtue of any particular authority, let it be mentioned. A landlord, however, may distrain not only upon the premises demised, but also the cattle or stock of his tenant depasturing on any common appendant or appurtenant, or any ways belonging to the same (*c*). The distress must not be made on a highway (*d*). It is made either by the landlord in person, or by some person deputed by him by warrant (*e*). The landlord cannot break open the outer door of a house to make a distress (*f*); nor can he break open or throw down gates or inclosures for that purpose (*g*). But if he have entered the house, he may, if necessary, break open an inner door, &c. (*h*).

At what Time made.

This distress must be made in the day-time (*i*). It may be made at any time during the term for which the premises are demised, or within six months after the determination thereof, provided the landlord's title and the tenant's possession continue at the time of the distress (*j*).

(*a*) See 52 H. 3, c. 21; 2 Inst. 131; Mir. c. 2, s. 26.

(*b*) *Dod v. Monger*, 6 Mod. 215; *Swann v. Earl Falmouth*, 8 B. & C. 456; *Wood v. Nunn*, 5 Bing. 10; 2 Moo. & P. 27, S. C.

(*c*) 11 G. 2, c. 12, s. 8: see *Furneaux v. Fotherby*, 4 Camp. 136.

(*d*) 52 Hen. 3, c. 51; *Buszard v. Capel*, 8 B. & C. 141; 3 Y. & J. 344; 3 Moo. & P. 480, S. C.

(*e*) It need not be in writing, though it usually is so. See the form of the warrant, Chit. Forms, 413. The stat. Westm. 2, c. 37, which requires distresses to be made by brokers sworn and known, does

not extend to distress for rent. (*Child v. Chamberlain*, 6 C. & P. 213).

(*f*) Co. Lit. 161; Comb. 17; 9 Vin. Abr. 128; see *Gould v. Bradstock*, 4 Taunt. 562.

(*g*) Co. Lit. 161.

(*h*) Id.; Comb. 17; *Browning v. Dann*, Hardw. 168; Bull. N. P. 81.

(*i*) Mirror, c. 2, s. 26; *Aldenburgh v. Peaple*, 6 C. & P. 212.

(*j*) 8 A. c. 14, ss. 6, 7; 3 & 4 W. 4, c. 42, ss. 37, 38; see *Burne v. Richardson*, 4 Taunt. 720; *Nuttall v. Staunton*, 6 D. & Ry. 155; 4 B. & C. 51, S. C.; Chit. Col. Stat. 665.

Inventory and Notice.] After seizure, an inventory should be taken of the distrainable goods upon the premises (*k*); copy it, and write at the foot of the copy a notice stating the cause of the distress, and that unless the rent be paid within five days, the goods shall be appraised and sold (*l*); and leave this copy "at the chief mansion-house, or other most notorious place on the premises" (*m*), or serve it personally on the tenant (*n*). If you remove the goods, state in your notice the place to which you have removed them.

Removal of the Goods.] The landlord may either remove the goods immediately, or he may allow them to remain on the premises for five days inclusive of the day of the seizure, and a reasonable time afterwards, leaving a person there in the care and possession of them, to prevent them from being clandestinely removed. He cannot, however, leave them on the premises an unreasonable time longer than the time above mentioned, otherwise he will render himself liable to an action of trespass (*o*); unless he have the tenant's consent to do so; and tenants usually request this as an indulgence, in order that they may be enabled in the meantime to raise money for the payment of the rent, or have an opportunity to replevy the distress (*p*). Get the tenant to give you a written memorandum of his consent to your continuing in possession (*q*). By 2 *W. & M. sess. 1, c. 5, s. 3*, however, sheaves of corn, &c., when distrained, may be impounded on the premises, until appraised and sold. And by the 11 *G. 2, c. 19, s. 8*, when corn, grass, &c., growing is distrained, it may be laid up in barns or other proper places on the premises, and shall not be appraised or sold until it shall have been cut, gathered, cured, and made (*r*); if sold before that time, the sale is void, and the property in the corn is not thereby divested out of the tenant, or passed to the vendee (*s*). And, lastly, by the 11 *G. 2, c. 19, s. 10*, any goods, when distrained, may be impounded on the premises, and may there be appraised and sold, in like manner as the distrainer might have done before off the premises.

If you remove the goods distrained, if they be household goods or other dead chattels, you must place them in a pound covert; that is, in some covered place of safety, where they may not be exposed to injury from the weather (*t*). But where cattle are distrained, they may be placed either in a pound overt or pound covert, at the option of the distrainer: if he place them in a pound covert, as in a stable or the like, he must feed and sustain them; but if in a pound overt, common or special, the owner must attend at his peril; and for that

(*k*) See the form, Chit. Forms, 413.

(*l*) *Ib.*

(*m*) 2 *W. & M. sess. 1, c. 5, s. 2*.

(*n*) *Walter v. Rumball*, 1 *Salk.* 247; 1 *L. Raym.* 53, *S. C.*

(*o*) *Winterbourne v. Morgan*, 11 *East*, 395; *Griffin v. Scott*, 1 *Str.* 717; 2 *L. Raym.* 1424, *S. C.*; *Pitt v. Shew*, 4 *B. & Ald.* 208; see *Wallace v. King*, 1 *H. Bl.* 13; *Etherton v. Popplewell*, 1 *East*, 139; 11 *G. 2, c. 19, s. 19*.

(*p*) See *Washburn v. Black*, 11 *East*, 405, *n.* (*a*): *Fisher v. Algar*, 2 *C. & P.*

374.

(*q*) See the form, Chit. Forms, 414.

(*r*) See *Peacock v. Purvis*, 2 *B. & B.* 362; 5 *Moore*, 79, *S. C.*; *Clark v. Gaskarth*, 8 *Taunt.* 431; 2 *Moore*, 491, *S. C.*; *Wright v. Dewes*, 3 *Nev. & M.* 790; 1 *A. & E.* 641, *S. C.*

(*s*) *Owen v. Leigh*, 3 *B. & Ald.* 470; see *Proudlove v. Tuemlow*, 1 *C. & M.* 326; *Notts v. Curtis*, 2 *C. & J.* 364, *n.*; *Biggins v. Goode*, *Id.*

(*t*) *Co. Lit.* 47.

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PART I.

purpose, if the distress be impounded in a special pound overt, notice thereof must be given to the owner(*t*). The distrainer is bound to see that the pound is in a fit and proper state to receive the distress; and is liable to make good to the owner any damage sustained by the cattle in consequence of its unfitness(*u*). By 52 *Hen.* 3, c. 4, a distress shall not be driven out of the county where it is taken(*c*); and by 1 & 2 *P. & M.* c. 12, s. 1, a distress of cattle shall not be driven out of the hundred, rape, wapentake, or lathe, where it is taken, unless to a pound overt within the same shire, and not above three miles distant from the place where such distress was taken(*w*).

Appraisement
and Sale.

Appraisement and Sale.] By the 2 *W. & M. sess.* 1, c. 5, s. 2, if the owner of the goods distrained shall not, within five days next after such distress taken, and notice thereof left at the chief mansion-house, or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place(*x*) where such distress shall be taken, cause the goods, &c., so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable shall swear to appraise the same truly, according to the best of their understanding); and, after such appraisement, shall sell the same for the best price that can be gotten for them, for satisfaction of the rent and charges of distress, appraisement, and sale; leaving the overplus (if any) with the sheriff, under-sheriff, or constable for the owner's use. Previous to this statute, a distress, even for rent, could not be sold. There must be two appraisers, even where the rent is under 20*l.* (*y*). But the tenant may waive the necessity for the appraisement by two brokers in any case(*z*).

When and
how.

Upon the sixth day, (inclusive of that on which the distress was made(*a*)), and after the lapse of five times twenty-four hours from the time of the original seizure(*b*), or within a reasonable time afterwards(*c*), *search at the sheriff's office, if the goods have been replevied; if not (d), send for the constable of the hundred, parish, or place(e), where the distress was made, and also two sworn appraisers(f); the constable will then administer the usual oath to the appraisers(g), and indorse a memoran-*

(*t*) Co. Lit. 47. But now, by 5 & 6 *W. 4*, c. 59, s. 4, (Cruelty to Animals Act), the distrainer is required to provide the animals impounded daily with good and sufficient food and nourishment, so long as they remain impounded, and is empowered to recover from the owners not exceeding double the value of the nourishment supplied, by proceeding before a justice of the peace, or by sale after seven days, in the manner pointed out by the act. And the 6th section inflicts a penalty of 5*s.* for every day's neglect.

(*u*) *Wilder v. Speer*, 3 *Nev.* & *P.* 536.

(*v*) See 2 *Inst.* 106.

(*w*) *Gimbart v. Pelah*, 2 *Str.* 1272.

(*x*) See *Avenell v. Croker*, 1 *M. & M.* 172; *Walter v. Rumbal*, 1 *L. Raym.* 53; 1 *Salk.* 247, *S. C.*; *Wallace v. King*, 1 *H. Bl.* 14.

(*y*) *Allen v. Hicker*, Q. B., 22nd June, 1839, on demurrer. See the previous

cases of *Fletcher v. Saunders*, 6 *C. & P.* 747; *Bishop v. Bryant*, *Id.* 484.

(*z*) *Bishop v. Bryant*, 6 *C. & P.* 484.

(*a*) *Wallace v. King*, 1 *H. Bl.* 13.

(*b*) *Harper v. Taswell*, 6 *C. & P.* 166.

(*c*) *Pitt v. Shew*, 4 *B. & Ald.* 208.

(*d*) If they have been replevied, you cannot sell them, though the replevin was had after the five days. (*Jacob v. King*, 1 *Marsh.* 135; 5 *Taunt.* 451, *S. C.*)

(*e*) He must not be the constable of another parish. (*Avenell v. Croker*, 1 *M. & M.* 172; *Wallace v. King*, 1 *H. Bl.* 13; and see *Walter v. Rumbal*, 1 *L. Raym.* 53; 1 *Salk.* 247, *S. C.*)

(*f*) Not the person distraining; (see *Westwood v. Cowne*, 1 *Stark.* 172; *Lyon v. Weldon*, 2 *Bing.* 337; 9 *Moore*, 629, *S. C.*); unless the tenant consent thereto. (*Bishop v. Bryant*, 6 *C. & P.* 484).

(*g*) The constable must swear the appraisers before the appraisement. (*Kenney*

dum of it upon the inventory(h). The appraisers, being sworn, proceed to appraise the goods, and having done so, write their appraisement also upon the inventory(h). The constable must be present during the appraisement(i). The appraisement should, it seems, be stamped(k). The goods are usually sold to the distrainer, or a third person, for the sum at which they were appraised; and a receipt for the sum paid for them entered on the inventory, and witnessed by the constable(l). Upon the equity of the 2 W. & M. sess. 1, c. 5, s. 2, the distrainer must sell for the best price that can be obtained for the goods, and an action lies if he does not. The price at which the goods were appraised will be presumed to be the best, till the contrary is proved(m). It appears that there is no order required by law to be observed in the sale of the goods(n). If there be a surplus, after payment of the rent and charges, let it be given to the constable to keep for the owner(o). If goods to the amount of the rent and charges have not been distrained, or if the distress die in the pound, or be otherwise destroyed by the act of God(p), the landlord may distrain again(q). As to the costs of distraining, &c., where the rent in arrear does not exceed 20*l.*, see the 57 G. 3, c. 93.

Where a distress shall be made for rent justly due, and any irregularity shall afterwards be committed by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party aggrieved may recover satisfaction for the special damage in an action of trespass or on the case; and if he recover, he shall have full costs(r). But he shall not recover in such an action, if tender of amends have been made before action brought(s). If, however, the first entry be illegal and unjustifiable, as if no rent whatever be due(t), or if the distress be after dark(u), or if the party distraining break open the outer door or the like, none of his proceedings would be protected by this act(v).

Action for
improper
Distress.

I have treated thus concisely of the manner of making a distress under this head of *replevin*, because the action of *replevin* usually originates in a distress. But it is a mistake to think that *replevin* lies only in the case of a wrongful distress; although, in practice it is usually confined to that injury, the action, in fact, in general lies in all cases where

v. May, 2 M. & M. 56). It seems, that if goods are received by the landlord which were not originally taken under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them. (*Bishop v. Bryant*, 6 C. & P. 484). See the form, Chit. Forms, 414.

(h) See the form, Chit. Forms, 415.

(i) *Kennedy v. May*, 2 M. & M. 56.

(k) 55 G. 3, c. 184.

(l) See upon this subject, generally, Gilbert on Distress and Replevin; Woodfall, L. & T., by Harrison.

(m) *Walter v. Rumbal*, 4 Mod. 390: Com. Dig. Distress, A.

(n) See *Jenner v. Yolland*, 6 Price, 5; 2 Chit. Rep. 167, S. C.

(o) 2 W. & M. sess. 1, c. 5, s. 2, ante, 790.

(p) *Vasper v. Eddows*, 1 Salk. 248; 1

L. Raym. 719, S. C.

(q) See *Brady*, 130: 1 Burn, J., 28th ed., 1132; *Hudd v. Ravenor*, 2 B. & B. 662; 5 Moore, 542, S. C.

(r) 11 G. 2, c. 19, s. 19.

(s) 11 G. 2, c. 19, s. 20: see *Winterbourne v. Morgan*, 11 East, 395; *Griffin v. Scott*, 2 Str. 717; 2 L. Raym. 1424, S. C.; *Wallace v. King*, 1 H. Bl. 13; *Etherton v. Popplewell*, 1 East, 139; *Branscombe v. Bridges*, 1 B. & C. 145; 2 D. & R. 256, S. C.

(t) See *Whitworth v. Smith*, 5 C. & P. 270.

(u) *Aldenburgh v. Peaple*, 6 C. & P. 212.

(v) See *Avenell v. Croker*, 1 M. & M. 173. See, as to damages, *Proudlove v. Twemlow*, 1 C. & M. 326; *Notts v. Curtis*, 2 C. & J. 364, n.; *Biggins v. Goode*, Id. The act is not confined to distresses on goods, (1 C. & M. 329).

mere personal chattels have been wrongfully taken and detained from a person without a lawful authority (*w*).

SECT. 2.

Replevin (*x*).

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| <ol style="list-style-type: none"> 1. <i>Proceedings to obtain the Replevin.</i>
<i>Replevin, when and how obtained, and Bond given</i>, 792.
<i>Capias in Withernam</i>, 794. 2. <i>Proceedings in the Inferior Court, id.</i> 3. <i>Removal of the Plaintiff to a Superior Court.</i>
<i>In what Cases removed</i>, 794.
<i>How removed</i>, 795. 4. <i>Proceedings in the Superior Court.</i>
<i>Appearance</i>, 796.
<i>Declaration</i>, 798.
<i>Nonpros, for want of</i>, 799.
<i>Avowry</i>, 801.
<i>Imparlance</i>, 802.
<i>Plea in Bar</i>, 804.
<i>Nonpros, for want of</i>, 805.
<i>Issue, id.</i> | <ol style="list-style-type: none"> 4. <i>Proceedings, &c., continued.</i>
<i>Proceedings on Demurrer</i>, 805.
<i>Staying Proceedings on Payment into Court, &c., id.</i>, 806.
<i>Discontinuing—Withdrawing Plea in Bar, &c., id.</i>
<i>Trial, &c.</i>, 807.
<i>New Trial</i>, 808.
<i>Costs, id.</i>
<i>Execution</i>, 809. 5. <i>Proceedings against the Sureties on the Replevin Bond.</i>
<i>Replevin Bond, when and how Forfeited</i>, 810.
<i>Assignment of, and Action on the Bond</i>, 811. 6. <i>Proceedings against the Sheriff</i>, 813. |
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1. *Proceedings to obtain the Replevin.*

Replevin,
when and how
obtained, and
Bond given.

Replevin, when and how obtained, and Bond given.] THE proceeding by original writ of *replegiari facias* out of Chancery, which was formerly necessary, being extremely tedious and the cattle or other goods being, in the meantime, detained from the owner to his great loss and damage, it was directed and enacted by the statute of Marlbridge (*y*), that the sheriff (*z*), without any writ being sued out of Chancery, shall proceed to replevy the goods, immediately upon complaint being made to him; and by the 1 & 2 *P. & M. c.* 12, the sheriff of every county shall appoint four deputies at least, dwelling not above twelve miles distant from each other, for the purpose of making replevies.

Replevin
Bond.

Before the sheriff or his deputy, however, can replevy, he must take pledges from the plaintiff, not only to prosecute his suit, but also to return the cattle or goods, if a return should be adjudged; and, if he take pledges in any other manner, he shall be answerable to the defendant for the price

(*w*) See 1 Chit. Pl. 6th ed. 162, 164.

(*z*) The proceedings in replevin or suits removed from inferior courts are not affected by the 2 W 4, c. 39.

(*y*) 52 H. 3, c. 21.

(*z*) Where the lord of the franchise has

the prescriptive right to grant replevins in the same manner as the sheriff had before the statute of Marlbridge, the sheriff has no concurrent jurisdiction with him. (*Mounsey v. Dawson*, 1 Nev. & P. 763).

or value of the cattle or goods replevied. The security taken by the sheriff, in pursuance of this act, is usually a bond, conditioned as is above mentioned (*a*). Also, by the 11 G. 2, c. 19, s. 23, in every replevin of a distress for rent, the sheriff or his deputy shall take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (to be ascertained on the oath of one witness), conditioned for prosecuting the suit with effect and without delay, and for a return of the goods, if a return should be awarded (*b*). A distress for a rent-charge is within the act (*c*). The bond should pursue the terms of the statute. It has been held, however, that a bond conditioned to prosecute the action with effect, and to indemnify the sheriff, is good; and may be assigned and proceeded on in the name of the assignee, under the statute, although it do not require, by the condition, that the suit shall be prosecuted without delay (*d*). And although the statute directs the bond to be taken with two sureties, yet a bond by one surety only is not void (*e*). As to the proceedings on this bond, and the liability of the sheriff and sureties, see *post*, 811, 812. Where one of the sureties was a material witness for the plaintiff, the Court of Common Pleas allowed another to be substituted for him (*f*).

The mode of proceeding is thus:—*Let the party intending to replevy give the names of two sufficient housekeepers of the city or county where the distress was made, to the sheriff's officer, who (after satisfying himself as to their sufficiency) will give him a certificate to the sheriff to that effect. Take this certificate to the office of the sheriff of that city or county, or to the office of his deputy, or replevin clerk; and upon the sheriff or his deputy being satisfied with the sufficiency of the sureties, and the bond being filled up, let it be executed by the plaintiff and his two sureties. A precept or warrant is then made out, commanding one of the sheriff's officers to replevy the goods, and deliver them to the plaintiff; and also to summon the defendant to appear at the next county court, to answer the plaintiff for the taking, &c. (g).* Upon this precept, the officer will replevy the goods, if found within the county, &c., the plaintiff, or some person in his behalf, accompanying him in order to identify them; and in doing this, the officer may use force if the distrainer make resistance, and may break open even the outer door of his dwelling-house, if the goods be there, having first signified the cause of his coming, and desired admittance (*h*). Care should be taken, in cases of distress for rent, to replevy before the expiration of five days inclusive after the distress made; otherwise the distrainer may sell the goods: though, indeed, they may be replevied at any time before they have been actually sold; and this, although after the five days (*i*). In all other cases

Practical Directions how to obtain the Replevin.

(a) *Blackett v. Crissop*, 1 L. Raym. 278.
(b) See form of this bond, Chit. Forms, 415.

(c) *Short v. Hubbard*, 2 Bing. 349; 9 Moore, 667, S. C.

(d) *Dunbary v. Dun*, 10 Price, 54; and see *Short v. Hubbard*, 2 Bing. 349; 9 Moore, 667, S. C.

(e) *Austen v. Howard*, 7 Taunt. 28; and see *Id.* 327; 1 Moore, 68; 2 Marsh, 352, S. C.; and see *Hacker v. Gordon*, 1 C. &

M. 58.

(f) *Bailey v. Bailey*, 1 Bing. 92; 7 Moore, 439, S. C.

(g) See the form of this warrant, Chit. Forms, 416; and of the summons thereon, *Id.* 417.

(h) 2 Inst. 193, 140; see 2 Ro. Abr. 552; 20 H. 6, 28.

(i) See *ante*, 790; *Jacob v. King*, 1 Marsh, 135; 5 Taunt. 451, S. C.

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of distress at common law, no time is limited for replevying, because the distrainer cannot sell the distress.

Capias in
Withernam.

Capias in Withernam.] If the goods have been eloiigned, so that the sheriff cannot replevy them, then, upon plaint being levied in the county court by the plaintiff, the sheriff may issue a precept in the nature of a *capias in withernam* (*k*), commanding his officer to take goods or cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff; the plaintiff having first given him a bond with sureties, similar to that above mentioned, conditioned to prosecute his suit, and to return the goods so to be delivered to him, if a return of them should be afterwards adjudged.

2. *Proceedings in the Inferior Court.*2. Proceedings
in the Inferior
Court.

After the goods have been replevied and delivered to the plaintiff, he must, according to the terms of the bond, levy his plaint at the next county court, and prosecute his suit with effect and without delay. On the plaint being levied, the defendant is summoned; and if the cause be not removed, the action proceeds to issue and trial in the ordinary way, in the inferior court. In the great majority of instances, the plaint is levied by lodging it at the office of the under-sheriff (*l*). If he do not levy his plaint at the next county court, or if he make default in any subsequent part of the proceedings, or do not prosecute the suit with success, either in the county court or in this court, after the removal of the cause (*m*), the defendant may take an assignment of the replevin-bond, and may proceed thereon against the plaintiff and his pledges, in the same manner as a plaintiff proceeds upon a bail-bond (*n*). As to what will be a forfeiture of the replevin-bond, see *post*, 810. Until the plaint is entered, there is no commencement of the suit, of which a superior court can take notice (*o*). The entering of the plaint is the act of the party, and if no plaint be entered, the bond is forfeited (*p*). The act of the sheriff or his deputy, in entering the plaint in replevin, is merely ministerial; it has, therefore, been held, that although a sheriff or his deputy neglects to enter a plaint in replevin, the Court of Queen's Bench will not compel him to do so on motion; yet, perhaps, they would grant a *mandamus* to enter the plaint (*q*).

3. *Removal of the Plaint to a superior Court.*3. Removal
of the Plaint.
In what Cases
removed.

In what Cases removed.] The suit may be prosecuted in the county court, however considerable the value of the goods may be (*r*). But if any right of freehold come in question, in the course of the proceedings in the county court, or ancient

(*k*) See form, Chit. Forms, 417: *Gwillim v. Holbrook*, 1 B. & P. 410.

(*l*) See form of plaint, Chit. Forms, 417.

(*m*) *Turnor v. Turner*, 2 B. & B. 112;
4 Moore, 616, S. C.

(*n*) See *ante*, 793; and Vol. I. 540. See the form of the plaint, Chit. Forms, 417.

(*o*) *Tesseyman v. Gildart*, 1 New Rep. 292.

(*p*) *Ex p. Boyle*, 2 D. & R. 13.

(*q*) *Ex p. Boyle*, 2 D. & R. 13: and see Harr. L. & T. 732.

(*r*) 25 H. 3, c. 21: 2 H. 7, 5 b: 2 Inst 139.

demesne be pleaded (*s*); or, if the queen be a party, or the taking be in right of the crown (*t*), the sheriff cannot proceed in the cause. So if the defendant claim property in the goods, and on a writ *de proprietate probanda* (*u*) they be found to be his, the sheriff can proceed no further, but must return the proceedings to the Queen's Bench or Common Pleas, to be there, if thought advisable, finally determined (*x*). So that it is usual in practice, in all cases, to remove the plaint as soon as it is levied, and before any proceedings are taken on it, into one of the courts at Westminster, in the first instance.

Plaint how removed.] The plaint may be removed by writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, according to circumstances. It may be removed either by the plaintiff or defendant: by the plaintiff, at pleasure; by the defendant, upon reasonable cause (*y*). This assignment of cause by the defendant, however, is at present but matter of form; it is assigned in the writ of *recordari*, &c., and cannot be denied or traversed by the sheriff or plaintiff (*z*). Where the action of replevin is commenced in a court baron, cause must be assigned for removing it, whether removed by the plaintiff or defendant (*a*).

Plaint how removed.

If the goods have been replevied, by virtue of a *replegiari facias*, (which is now rarely, if ever, the case), the plaint in the county court is removed by writ of *pone* (*b*). This is an original writ, obtained from the cursitor, bearing *teste* after the entry of the plaint in the county court, and returnable on a general return day in term, wheresoever &c.; but, if it happen to bear *teste* before the entry of the plaint, it is not material (*c*). The writ of *pone* is also the proper writ to remove all suits, which are before the sheriff by writ of *justicies*. In other respects, it does not differ from the writ of *recordari facias loquelam* (*d*).

By Writ of Pone.

If the goods have been replevied upon mere application to the sheriff, (as is now usually the case), without writ, the plaint is removed by writ of *recordari facias loquelam*. This is also an original writ, to be obtained from the cursitor, tested and returnable like the *pone* (*e*).

By Re. Fa. Lo.

If the plaint be levied in a court baron, it is removed by writ of *accedas ad curiam*. This is also an original writ, in every respect the same as the *recordari*, excepting that it directs the sheriff to go to the lord's court, and there cause the plaint to be recorded, and so to return it to the court above. This writ must, it seems, bear *teste* after the entry of the plaint, otherwise it will be bad (*f*).

By Accedas ad Curiam.

In no instance, where the plaint is in an inferior court, not of record, should the plaint be removed by *certiorari*; for, if so removed, as the plaintiff, in such case, is not bound to fol-

In Certiorari.

(s) Finch, L. 317: 4 H. 6, 30: 2 H. 7, 6: Co. Lit. 145.

(t) Bro. Abr., Replevin, 3.

(u) See form, Chit. Forms, 417.

(x) See Harr. L. & T. 739: Bac. Abr., Replevin, (E 4).

(y) F. N. B. 69 M., 70 B.

(z) Talbot v. Binns, 8 Bing. 71: 1 M. & Scott, 148. S. C.: Parkes v. Renton, 3 B. & Ad. 105. See form, Chit. Forms, 419.

(a) Reg. 85 b: F. N. B. 70 A; 2 Inst. 339: 27 H. 6, 3 b, 4 a: Doct. Pl. 356.

(b) F. N. B. 69 M.

(c) F. N. B. 71 D.

(d) Greenw. 22: Wats. Sheriff, 293. See forms, Chit. Forms, 419.

(e) See the form, Chit. Forms, 419.

(f) F. N. B. 71 D: sed vide Gilb. Rep. 150. See the form, Chit. Forms, 424.

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low the suit, the defendant could never *nonpros* him in the superior court for not declaring (*g*). But, where the replevin suit is in an inferior court of record, it is removed by *certiorari* (*h*). Where a defendant has erroneously sued out a writ of *certiorari* instead of *pone* or *re. fa. lo.*, and has taken no steps upon it, the rule to quash it on his application is absolute in the first instance (*i*).

Writ, how
sued out and
returned.

In order to sue out any of these writs, *make out a præcipe* (*j*); *take it to the cursitor, and upon telling him when the next county court will be holden, he will make out the writ. Then take it to the office of the under-sheriff of the county, &c., who will allow and return it* (*k*). If the sheriff return the writ *tarde*, the party may sue out an *alias*, &c. (*l*). If, to a writ of *accedas ad curiam*, the sheriff return that the lord refused to hold his court, a *distringas* then issues, commanding the sheriff to distrain the lord to hold his court; and after that, a *sicut alias*, &c. (*m*). If the sheriff do not return the *recordari*, &c., so as to enable you to file it, you should rule him to return it in the manner directed, *Vol. I. 549* (*n*).

When re-
turned and
filed.

When you have got the writ returned, file it with one of the masters. The writ should be returned and filed within two terms at least after the writ is returnable; otherwise the opposite party may obtain a certificate from one of the masters that no such writ and return are filed, and the cursitor will thereupon issue a writ of *procedendo*, by which the cause may be removed back to and proceeded in, in the inferior court (*o*). Or if either party, having sued out a *re. fa. lo.*, neglect to file it, the other party, for the sake of expedition, may, without waiting till the end of the second term, sue out another writ of the same nature, and get it returned and filed, for removing the proceedings into the court above (*p*). If the return, however, be filed, a writ of *procedendo* cannot, it seems, afterwards be had, unless, perhaps, where the cause was removed from a court of ancient demesne (*q*). If not filed on the return day, a notice of its being filed should be given to the opposite party (*r*).

Effect of the
Writ.

The delivery of the writ to the sheriff stays all further proceedings in the suit in the county court, even although delivered after interlocutory, provided it be before final judgment (*s*). If the sheriff proceed further, such subsequent proceedings are void, and the sheriff is liable to an attachment (*t*). The writ, however, removes the plaint only, and not any of the subsequent proceedings; and the plaint is removed by it, although the plea in the court below may have been discontinued (*u*).

4. Proceedings
in the Superior
Court.
Appearance.

4. Proceedings in the Superior Court.

Appearance.] The defendant must enter his appearance

(*g*) *Clerk v. Mayor of Berwick*, 4 B. & C. 104; 7 D. & R. 104, S. C.; *Edwards v. Bowen*, 5 B. & C. 206; 7 D. & R. 709, S. C.

(*h*) *Wilk. Replevin*, 26.

(*i*) *Ruffman v. Thornwell*, 7 Dowl. 613.

(*j*) See the form, Chit. Forms, 418.

(*k*) See the form of the return, Chit. Forms, 420; and of the schedule to be annexed to the writ and return, *Id.*

(*l*) *F. N. B.* 70 B.

(*m*) *F. N. B.* 18 E.

(*n*) See *Bevan v. Prothesk*, 2 Burr. 1151.

(*o*) 2 Sellon, 162; 1 Tidd, 410. See form of *procedendo*, Chit. Forms, 421.

(*p*) *Id.*

(*q*) *F. N. B.* 69 M. (*a*). *Gilb. Replevin*, 10, 11; *sed quære*.

(*r*) See form, Chit. Forms, 421.

(*s*) *Bevan v. Prothesk*, 2 Burr. 1151.

(*t*) *F. N. B.* 4 E.

(*u*) *F. N. B.* 71 A.

with one of the masters, before the plaintiff can declare in the superior court, or the defendant rule him to do so. This regularly should be done on or before the *quarto die post* of the return of the *recordari*, &c. *Make out a præcipe for the appearance (r), and take it to one of the masters, who will thereupon enter the appearance.*

If the plaintiff wish to expedite the cause, and for that purpose to procure the defendant's appearance, *he should, it seems, obtain a rule to appear from one of the masters (x); enter it with him, and serve a copy of it upon the defendant.* This is usually done where the plaintiff's attorney files the *re. fa. lo.* *This rule expires in four days; and if the defendant have not entered his appearance within that time, then, if the plaint have been removed by the plaintiff by pone or recordari, sue out a pone per vadios with one of the masters (y), and get it sealed; upon which the sheriff will summon the defendant (z).* On the *quarto die post* of the return day of the pone, search with the masters if the defendant have entered an appearance; and if not, one of the masters will make out a *distringas (a)*, upon your furnishing him with a præcipe; get the *distringas* sealed. This is a judicial writ, commanding the sheriff to distrain the defendant by all his goods and chattels, so that he be before the queen on a general return day, wheresoever &c., or in the Common Pleas, before the queen's justices at Westminster, to answer the plaintiff of a plea, of &c. (b). It must bear *teste* in term time, be returnable on a general return day, in the same or in the next term, and have fifteen days between the *teste* and return. Care must be taken that the defendant be correctly named in the writ, otherwise the sheriff will not be justified in executing it (c). *Take this writ to the sheriff's office, and obtain a warrant thereon; give the same to your officer, who will thereupon levy the sum of 40s. (d).* If the defendant have not entered an appearance on the *quarto die post* of the return of the *distringas*, get the writ returned, and sue out an *alias*, and after that a *pluries*; or if the sheriff return *nulla bona*, you may sue out a *testatum distringas* into a different county (e). Upon suing out the *alias*, move the court to increase the issues, who will thereupon grant a rule absolute in the first instance; draw up the rule with one of the masters (f), annex a copy of it to the *alias distringas*, and leave it with the sheriff to be executed as above directed. If, upon the *quarto die post* of the return of this writ, the defendant have not entered an appearance, sue out a *pluries distringas*, and again move the court to increase the issues, which they will now order to the amount of the debt and costs; draw up the rule, and get the writ executed, as above directed. If, on the *quarto die post* of this writ, the defendant have not appeared, then, in pursuance of stat. 10 G. 3, c. 50, move for a rule to shew cause "why the issues returned upon the several writs of *distringas* should not be sold, and the monies

Appearance,
how com-
pelled.

(v) See form of the *præcipe* for appearance, Chit. Forms, 423.

(x) Tidd, 9th ed., 416; Pr. Reg. 371: *sed quare* if there be any such rule? (See Chit. Forms, 422).

(y) See the form, Chit. Forms, 423.

(z) See the form of the summons, Chit. Forms, 423.

(a) See the form, Chit. Forms, 423.

(b) *Ib.*

(c) *Cole v. Hindson*, 6 T. R. 234.

(d) See *Blossam v. Surtees*, 4 East, 162.

(e) *Id.* See the form of the *alias* and *pluries*, Chit. Forms, 424; and of the *testatum*, Arch. Forms, 451.

(f) See the form, Arch. Forms, 451.

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arising from the sale thereof should not be forthwith brought into court; and why it should not be referred to one of the masters to tax the plaintiff his costs, occasioned by his issuing out the said several writs; and why such costs, when taxed, should not be paid out of the monies so brought into court; and why the surplus of the said monies, after payment of the said costs, should not be retained in court, until the purpose of the said writs be answered" (g). Move this upon an affidavit, stating the issuing and returns of the writs of distringas, and that the defendant has not appeared (h). Draw up the rule, and serve a copy of it upon the sheriff. Afterwards, move to make the rule absolute; draw up the rule and serve a copy on the sheriff, at the same time shewing the original; and if he do not pay the money into court, move for an attachment. If the money be paid in, make out a bill of costs, and get it taxed; then take the rule and allocatur to one of the masters, and he will pay you the amount of the costs (i). You may afterwards proceed by distringas thus ad infinitum, applying from time to time to sell the issues for payment of costs, until the defendant appear (k); but if nulla bona be returned to the distringas, then sue out a capias, and so proceed to outlawry (l). If the plaint, however, have been removed by the defendant (m), or by the plaintiff by writ of accedas ad curiam (n), the first process after the rule to appear is the distringas, omitting the pone per vadios.

The Declaration.

The Declaration.] If the defendant come in upon any of these writs, and enter his appearance, the plaintiff may then deliver or file his declaration, as in ordinary cases (o).

Rule to Declare.

If the defendant wish to expedite the cause, then, on or after the quarto die post of the return of the recordari, having first entered an appearance with the masters, get a rule to declare from one of the masters (p), and serve a copy of it upon the plaintiff, or upon his attorney or agent, if the cause were removed by him. Such rule may be given within four days after the end of the term in which the writ is returned, or afterwards (q).

Rule for Time to Declare.

The plaintiff may, as in other cases, obtain a rule for time to declare (r), and the court will not, it seems, set the rule aside, and compel the plaintiff to declare sooner in this form of action than in another (s).

Form of Declaration.

As to the mode of framing the declaration in general, see 2 *Chit. Pl. 6th ed.* 602; 1 *Id.* 262. The declaration in replevin, where the suit is removed by *re. fa. lo.*, must, before the rule of *H. T.*, 4 *W. 4*, r. 1, *ante*, 145, have been intitled, either of the term in which the writ was returnable, or of that in which it was delivered. If it was intitled of an intermediate term,

(g) See as to the form of the rule, *Arch. Forms*, 452.

(h) See the form, *Arch. Forms*, 451.

(i) See *Martin v. Townsend*, 5 *Burr.* 2725.

(k) See form of *alias* and *pluries*, *Chit. Forms*, 424.

(l) *F. N. B.* 70 A (a). See form of *capias*, *Chit. Forms*, 424.

(m) *F. N. B.* 70 A (a).

(n) *Thompson v. Jordan*, 2 *B. & P.* 137.

(o) See form of declaration, *Chit. Forms*, 434; see *Topping v. Fuge*, 5 *Taunt.* 771; 1 *Marsh.* 341, *S. C.*

(p) By *R. H.*, 2 *W. 4*, r. 38, "it shall

not be necessary for a defendant, in any case, to give a rule to declare, except upon removals from inferior courts." (See the form of rule, *Chit. Forms*, 425).

(q) By *R. H.*, 2 *W. 4*, r. 37, "where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is returned." Formerly, the rule might have been given in fourteen days after term. (*Edwards v. Dunch*, 11 *East*, 183).

(r) See *ante*, Vol. I. 138.

(s) *Craven v. Vavasour*, 5 *Taunt.* 35.

judgment for want of a plea might, it seems, have been set aside(*t*). Since that rule, however, it is usual, in practice, to date the declaration of the day it is filed or delivered, and this practice seems to be correct; but it has not been decided whether it is applicable to proceedings in replevin.

A married woman whose husband lived abroad, renting premises in her own name, not stating whether she was married or single, having paid rent to A., of whom she took the premises, under a threat of distress, she was distrained upon by B., claiming to be the landlord, for the same rent. She brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his pleas, and avow; in which case the plaintiff's coverture should not be set up; it was held, that such an order could not be made without the defendant's consent, though in a case of obvious oppression, and the order was set aside(*u*).

Amendment of.

Nonpros for Want of Declaration, and subsequent Proceedings thereon.] In order to obtain a judgment of *nonpros* for not declaring, in addition to the above rule to declare, a written demand of declaration should be served on the plaintiff or his attorney or agent (as the case may be)(*x*); and in four days after the service of such rule and the making of such demand have severally expired, and the plaintiff has not declared, the defendant may sign judgment of *nonpros*(*y*). It may be observed that the plaintiff is bound, as of course, to declare within a year next after the return day of the *re. fa. lo.*, or writ by which the replevin suit is removed, otherwise he will be deemed out of court(*z*). Where a replevin suit was removed from an inferior jurisdiction into the Queen's Bench by *certiorari*, and the defendant signed judgment of *nonpros* for not declaring, the court held the judgment irregular, and refused to refer it to the master to tax the defendant his costs, on the ground of the distinction between a *re. fa. lo.* and a *certiorari*, the former giving a day to the parties to appear in court, the latter none(*a*). Sign the judgment of *nonpros*, as directed post, Book IV. Part I. Ch. 17.

Nonpros for Want of Declaration, and subsequent Proceedings thereon.

The judgment of *nonpros* at common law is, that the defendant shall have a return of the goods replevied, and his costs(*b*). The plaintiff, however, is not prevented by this judgment from proceeding, for he may sue out a writ of second deliverance(*c*); in execution of which, the sheriff must again take the goods from the defendant, and deliver them to the

Writ of second Deliverance.

(*t*) *Topping v. Fuge*, 5 Taunt. 771. See form of declaration, Chit. Forms, 434.

(*u*) *Ewbanke v. Owen*, 5 A. & E. 298.

(*x*) By R. T., 1 W. 4, r. 4, "no judgment of *nonpros* shall be signed for want of a declaration until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney or agent, as the case may be."

(*y*) F. N. B. 70 A.; R. T., 1 W. 4: *Edwards v. Dunch*, 11 East, 183.

(*z*) See *ante*, Vol. I. 137: *Norrish v. Richards*, 5 Nev. & M. 268; 1 H. & W. 437, S. C.

(*a*) *Clerk v. Mayor of Berwick*, 4 B. & C. 649.

(*b*) See the form, Chit. Forms, 426; and see form of writ of *retorno habendo* thereon, Id.; and of *fi. fa.* or *ca. sa.* for the costs, Id. 427.

(*c*) 2 Inst. 340; Stat. Westm. 2, c. 2.

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plaintiff; or the writ will operate in the sheriff's hands as a *supersedeas* of the writ *de retorno habendo*, if the latter writ have not as yet been executed (*d*). If the plaintiff intend to proceed thus, *let an award of the writ of second deliverance be entered upon the roll after the judgment of nonpros* (*e*). *Then sue out the writ with the cursitor* (*f*). The proceedings upon this writ are the same as in ordinary cases of replevin, where the action is commenced by writ, as already mentioned; and if the defendant have judgment, either upon verdict, demurrer, or of *nonpros*, it is for a return irreplevisable, and he shall have a writ *de retorno habendo* (*g*); which being executed, the plaintiff cannot have any further writ of deliverance. But if the plaintiff do not sue out a writ of second deliverance, and to the writ *de retorno habendo* the sheriff should return that the goods, &c., are *eloigned* (*h*), the defendant shall then have a *capias in withernam* (*i*), and after that an *alias* and *pluries*, until it is executed (*k*). The *capias in withernam*, however, in this case, is but mesne process, to compel the plaintiff to declare (*l*); and as soon as he has declared, he may, it seems, obtain a restitution of the goods taken under it, upon motion (*m*).

Suggestion
and Writ of
Inquiry under
17 C. 2, c. 7,
s. 2, after
Nonpros for
Want of De-
claration.

But in cases where the replevin is of goods distrained for rent, if the plaintiff be *nonprosessed*, the defendant, after entering the judgment for a return, (and which must still be entered, although it is never executed) (*n*), may, by 17 C. 2, c. 7, s. 2, make a suggestion on the roll, in the nature of an avowry or conusance, and pray a writ of inquiry to be directed to the sheriff of the county where the distress was taken, to inquire of the rent in arrear at the time of the distress, and also of the value of the distress. Then follows on the roll the award of the writ of inquiry (of the execution of which fifteen days' notice must be given to the plaintiff or his attorney) (*o*); then the sheriff's return of the finding of the inquest; and, lastly, follows an entry of the final judgment. If the inquest find the value of the distress to be as much or more than the amount of the arrears of rent, then the final judgment shall be, that the defendant recover the amount of such arrears, and full costs of suit; but if the distress be less than the arrears, then the judgment shall be for the sum at which the distress is valued by the inquest, together with full costs of suit (*p*). The defendant may have execution of this judgment by *fieri facias*, *ca. sa.*, or *elegit* (*q*); but cannot, of course, have a writ *de retorno habendo* (*r*). This statute does not take away or alter the judgment at common law, it only gives a further remedy to the avowant: and it is always at the election of the defendant, whether he will proceed under the

(*d*) *Anon.*, Latch. 72: *Argoll v. Cheney*, Palm. 403: *Pratt v. Rutledge*, 1 Salk. 95.

(*e*) See form of it, Chit. Forms, 426.

(*f*) See form, Chit. Forms, 427; and return thereto, Id. 428.

(*g*) 2 Inst. 341.

(*h*) See form, Chit. Forms, 427.

(*i*) Id. 428.

(*k*) See the form, Chit. Forms, 424.

(*l*) *Moor v. Watts*, 1 L. Raym. 614; 12 Mod. 423, S. C.

(*m*) *Webb v. Hinde*, Noy, 50; and see *De la Bastide v. Reynel*, Comb. 201: *Moor v. Watts*, 2 Salk. 582.

(*n*) See *Cooper v. Sherbrooke*, 2 Wils. 117; *Barnes*, 427, S. C.: *Baker v. Lade*, Carth. 253.

(*o*) 17 C. 2, c. 7, s. 2. See *Burton v. Hickey*, 6 Taunt. 57; 1 Marsh. 444, S. C.

(*p*) 17 C. 2, c. 7, s. 2. See the forms of suggestion, &c., and judgment, Chit. Forms, 432; of writ of inquiry, Id. 430; of notice of inquiry, Id. 431; of inquisition thereon, Id. 432; and of entry thereupon upon the roll, Id. 432.

(*q*) 17 C. 2, c. 7, s. 2.

(*r*) See the forms of the *fi. fa.* and *ca. sa.*, Chit. Forms, 433.

statute or not(s). This mode of proceeding by writ of inquiry under the statute is in many cases advisable, as a writ of second deliverance after it would be inoperative, the goods still remaining with the plaintiff(t). The court, in some cases, under particular circumstances, will set aside this judgment of *nonpros*, &c., and let in the plaintiff to declare upon payment of costs(u).

Or, instead of executing a writ of inquiry, under this statute, the defendant, having signed judgment of *nonpros*, in cases where the replevin is of a distress for rent, may take an assignment of the replevin-bond, and proceed upon it against the plaintiff and his pledges(x).

Proceeding
on the Re-
plevin-bond.

Avowry.] When the plaintiff has delivered or filed his declaration, let him give notice to the defendant to avow, in the manner directed, Vol. I. 152, as to the notice to plead; also let him enter a rule to avow with the masters in the manner directed, Vol. I. 157, as to the rule to plead(y). Then demand an avowry, in the same manner you demand a plea(z); and if the defendant do not deliver his avowry or cognizance, &c., within the time limited for that purpose, sign judgment by default, and execute a writ of inquiry, as directed ante, 702 (a). It is doubtful whether the enactment of 2 W. 4, c. 39, s. 11, as to pleading between the 10th August and 24th October, and the rule of M. T., 3 W. 4, r. 12, framed to meet it(b), or the rules of H. T., 4 W. 4, as to pleadings, &c., in general, except the rules prohibiting several avowries of the same kind being pleaded(c), apply to a replevin suit. It is the practice to treat them as applicable.

Avowry.

How com-
pelled.

If the defendant plead, avow, or make cognizance, let the plea or avowry, &c., if it conclude with a certification, be signed by counsel, and delivered to the plaintiff's attorney or agent. If he plead or avow double, first obtain a judge's order for that purpose, as directed, Vol. I. 179. The pleading a double plea, avowry, or cognizance, without a rule for that purpose, would entitle the plaintiff to sign judgment(d). The plea of *cepit in alio loco* is not a plea in abatement, but a plea in bar; and therefore an affidavit to verify it is not required(e).

How framed
and delivered

As regards the time for avowing or making a cognizance, &c., the notice must be to avow, &c., within four days, if the *venue* be laid in London or Middlesex, and the defendant reside within twenty miles of London; or within eight days, if the *venue* be laid in any other county, or the defendant reside above twenty miles from London(f); and in default of avowry, &c., the plaintiff may sign judgment(g). In some cases, however, the defendant is entitled to what is termed an *imparlance*, or, in other words, to a further time to plead, and which shall be now noticed.

Time for.

(s) *Rees v. Morgan*, 3 T. R. 350.

(t) *Playters v. Sheering*, 1 Vent. 64; Bull. N. P. 58; *Cooper v. Sherbrooke*, Barnes, 427; 2 Wils. 116, S. C.

(u) *Playters v. Sheering*, 1 Vent. 64.

(x) See Chit. Forms, 416; and see *Turner v. Turner*, 2 B. & B. 107; 4 Moore, 606, S. C.: *sed vide* 2 Tidd, 1056.

(y) See Chit. Forms, 434.

(z) See Vol. I. 153; and see Chit.

Forms, 39.

(a) See as to the forms of the judgment, &c., Chit. Forms, 434, 435.

(b) *Ante*, Vol. I. 153.

(c) *Ante*, Vol. I. 179.

(d) R. H., 2 W. 4, r. 1, s. 34, *ante*, Vol. I. 179.

(e) *Bullythorpe v. Turner*, Willes, 475.

(f) *Ante*, Vol. I. 153.

(g) R. T., 5 & G. 2.

BOOK III.
PART I.

Imparlanee.

Imparlanee.] An imparlanee, or *licentia loquendi*, is a leave given by the court to the defendant to speak with the plaintiff, to see if they can end the matter in dispute amicably, without suit, if possible (*h*). But, in effect, it is time given to the defendant to plead. It is doubtful whether an imparlanee is not now abolished in replevin as well as other suits; it would seem that it is, and at least it is the practice to consider it so. In this uncertainty, however, it is deemed proper to state the law upon the subject of imparlanees.

Time given
by.

As regards the time given by his imparlanee, before the rules of *T. T.*, 1 *W.* 4, and *H. T.*, 2 *W.* 4, *r.* 3, if the process were returnable on or after the last general return of the term (*i*), or if the plaintiff had neglected to deliver his declaration, or to file it and give notice thereof, four days exclusive before the end of the term in which the process was returnable (*k*), the defendant was entitled to an imparlanee over to the next term after that in which the declaration was delivered or filed, and must have pleaded within the first four days thereof (*l*). But now, by the rule of *T. T.*, 1 *W.* 4, it is ordered, that upon every declaration delivered or filed on or before the *last* day of the term (*m*), the defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlanee. And by the more recent rule of *H. T.*, 2 *W.* 4, *r.* 3, in Hilary and Trinity terms, the plaintiff in a *country* cause may declare *de bene esse* within four days after the end of the term, as of such term. If not delivered or filed within this time, then it must be delivered or filed before the *first* day (*n*) of the subsequent term, or the defendant will be allowed to imparl to the third or subsequent term, and shall plead within the first four days thereof (*o*). But where the defendant does not appear on or before the last day of a term, he is not entitled to an imparlanee over to the third term, although the plaintiff do not declare before the first day of the second term; for the plaintiff cannot in replevin, nor is he obliged in any case to declare until the defendant is fully in court, and no *laches* can consequently be imputed to him for not declaring until after that time (*p*). For the same reason, if a joint writ issue against two defendants, and they appear in different terms, neither can claim an imparlanee upon the ground of the plaintiff's not having declared in the term in which the first defendant appeared; for he could not, in fact, have declared until both the defendants were before the court (*q*). Also, for the same reason, where the plaintiff is

(*h*) 3 Bl. Com. 298. According to the decision of Taunton, J., (in *Fream v. Chaplin*, 2 Dowl. 523), it would seem that the right to an imparlanee still exists in all cases, and is not confined to an action of replevin or suits removed from inferior courts, &c.; but that decision was overruled in *Wigley v. Thomas*, 3 Dowl. 8.

(*i*) See R. T., 5 & 6 G. 2: R. T., 22 G. 3.

(*k*) See R. T., 5 & 6 G. 2 b: R. T., 22 G. 3.

(*l*) 2 Saund. 2.

(*m*) See *Edensor v. Hoffman*, 2 C. & J. 140.

(*n*) Before the 11 G. 4 & 1 W. 4, c. 70, it must have been so filed or delivered

before the *essoign* day; but that act, it seems, has done away with that day for all purposes, as part of the term. (See *Price v. Hughes*, 1 Dowl. 448).

(*o*) 2 Saund. 2: see *Whalley v. Barnett*, 1 Dowl. 607.

(*p*) *Smith v. James*, 6 T. R. 752; *Wood v. Wenman*, 1 Wils. 154; *Winter v. Barnes*, 9 D. & R. 18; *Rolleston v. Scott*, 5 T. R. 362; *Cook v. Allen*, 1 C. & M. 350; and see *Basley v. Huntler*, 2 B. & P. 126: *sed vide Thompson v. Jordan*, 2 B. & P. 137.

(*q*) Tidd, 9th ed. 467: *R. v. Shiffs*, *of London*, in *Day v. Morley*, 1 Chit. Rep. 359: see *Smith v. Muller*, 3 T. R. 626, 627.

prevented from declaring the same term the writ is returnable, by his being obliged to proceed to outlawry against some of the defendants, the others who have been served or arrested are not entitled to an impar lance (*r*). So, if by any other act of the defendant's, the plaintiff is prevented from declaring in time, the defendant shall not be entitled to an impar lance (*s*).

If the defendant plead without *impar lance*, and his plea be a nullity, so that the plaintiff signs judgment for want of a plea, the court will not set aside the judgment for being signed too soon; for, by pleading, the defendant waived his right to an *impar lance* (*t*). Taking out a summons for time to plead, upon which the plaintiff indorses his consent, or obtaining an order thereon, is a waiver of the right to an *impar lance* (*u*).

Waived by
Pleading.

The *impar lance* thus obtained is a *general* *impar lance*; but the defendant may have a *special* *impar lance*, when necessary, by leave of the court, obtained by a side-bar rule for that purpose (*x*), or a *general special* *impar lance*, under particular circumstances, by moving the court for it within the first four days of the next term (*z*).

The *general impar lance* is a leave to imparl generally to the next term, without any saving of exceptions; and may be entered as of course, in all cases where the defendant is entitled to it (*a*). After a general *impar lance*, the defendant can plead only in bar, and not in abatement (*b*); or to the jurisdiction, or any other dilatory plea; nor can he claim cognizance or demand *oyer* (*c*). Formerly, it was holden that he could not plead a tender, although latterly the law has been considered to be otherwise (*d*); still, however, it seems, a rule of court or a judge's order must be obtained for leave to plead it as of the preceding term (*e*); so that, upon the face of it, it may not appear to be pleaded after an *impar lance*. But if a declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea (*f*).

General Im-
par lance,
what, and
Effect of.

The *special impar lance* contains a saving of all exceptions to the writ, bill, or count (*g*); and is necessary where the defendant intends to plead in abatement, of a term subsequent to the declaration (*h*). It cannot be had without leave of the court (*i*), obtained by a side-bar rule for that purpose (*k*). After a *special impar lance* the defendant cannot plead to the jurisdiction, or a plea of privilege; but he must obtain a *general special impar lance* to enable him to do so (*l*).

Special Im-
par lance,
what, and
Effect of.

(*r*) *Martin v. Bradley*, E., 18 G. 3: *Cod-
win v. Seaman*, M. 1797; MS., B. 1211.

(*d*) 1 Saund 33 b: 2 Saund. 2.

(*s*) *Page v. Vogel*, 2 B. & Ald 390; 1
Chit. Rep. 230, S. C.: *Rooke v. Leicester*

(*e*) *King v. Nichols*, Barnes, 343, 347,
349: and see *Kilwick v. Maidman*, 1 Burr.

(*t*) *Earl of*, 2 T. R. 16.

59.

(*u*) *Edensor v. Hoffman*, 2. C. & J.

(*f*) R. H., 2 W. 4, r. 45: 1 Salk. 347.
(*g*) See the form of entering it, Arch.
Forms, 288, 289.

140.

(*h*) 2 Saund. 2: *Doughty v. Lascelles*, 4
T. R. 520: *Blackmore v. Flemyng*, 7 Id.
477, n.

(*x*) R. E., 5 A.: 2 Saund. 2 a.

(*i*) R. E., 5 A.

(*z*) 2 Saund. 2 a, b: Tidd, 9th ed. 467.

(*k*) See the form of the rule, Arch.
Forms, 287.

(*a*) See the form of entering it, Arch.
Forms, 91.

(*l*) 2 Saund. 2 b: *Godefroy v. Jay*, 6
Bing. 616; 1 Moo. & P. 440, S. C. The

(*b*) *Lloyd v. Williams*, 2 M. & Sel. 484:
Buddle v. Wilson, 6 T. R. 369.

(*c*) 2 Saund. 2.

BOOK III.
PART I.General Special Impar-
lance.

The *general special imparlance* contains a saving of all advantages and exceptions whatsoever. The entry of it is the same as that of the special imparlance, excepting that, instead of the saving in the latter, you insert the words "saving to himself all advantages and exceptions whatsoever." This kind of imparlance is necessary, where the defendant intends to plead to the jurisdiction(*m*), or to plead his privilege(*n*), of a term subsequent to the declaration. It is obtained by application to the court, within the first four days of the next term. It is in the discretion of the court, however, governed by the particular circumstances of the case, to grant it or not(*o*); they will not grant it, for instance, if the defendant have appeared by attorney(*p*), because a plea to the jurisdiction must be pleaded in person.

What may be
Pleaded after.

If the defendant plead in abatement after the general imparlance, or to the jurisdiction after a special imparlance, the plaintiff may either sign judgment(*q*), (except in a questionable case(*r*)), or apply to the court to set aside the plea(*s*), or may demur generally(*t*), or may allege the imparlance in his replication, by way of *estoppel*(*u*); but if, instead of doing so, the plaintiff reply to the plea, the fault is cured(*x*). Or, if the imparlance be obtained irregularly,—as, if a special imparlance be entered without a side-bar rule first obtained for that purpose, or a general special imparlance without leave first obtained of the court upon motion,—it should seem that the plaintiff may sign judgment(*y*).

Plea in Bar.

Plea in Bar.] As soon as the defendant has avowed, &c., he may rule the plaintiff to plead, in the same manner as directed *ante*, Vol. I. 195, as to the rule to reply; and if the plaintiff do not plead within the time limited by the rule, and four days after demand of plea, the defendant may sign judgment of *nonpros*. It is doubtful whether the enactment of the 2 W. 4, c. 39, s. 11, as to pleading between the 10th August and 24th October, and the rule of M. T., 3 W. 4, r. 12, framed to meet it(*z*), or the rules of H. T., 4 W. 4, as to pleading &c. in general, apply to a replevin suit: it is the practice to treat them as so applicable, and such practice seems to be correct.

The Plea,
how framed
and delivered.

If the plaintiff plead to the avowry or consuance, *let the plea, if it conclude with a verification, be signed by counsel; engross it on plain paper, and deliver it to the opposite attorney or agent*(*a*). If the plaintiff plead double, (which he may do, 4 A. c. 16, s. 4), a judge's order must first be obtained for that purpose, as directed, Vol. I. 179; and, if he pleaded double without a rule for that purpose, defendant might sign judgment of *nonpros*(*b*).

court, in the last case, thought the plaintiff ought to have demurred, and not signed judgment for want of a plea.

(*m*) 2 Saund. 2 b.

(*n*) Hardr. 365: 1 Lutw. 46: 12 Mod. 529: Gilb. C. B. 210, 211.

(*o*) 2 Saund. 2 b.

(*p*) *Grant v. Sodes*, 2 W. Bl. 1094: 2 Saund. 2 B.

(*q*) *Doughty v. Lascelles*, 4 T. R. 520: *Blackmore v. Flemmyng*, 7 T. R. 447, n.

(*r*) *Godefroy v. Jay*, 4 Moo. & P. 440; 6 Bing. 616, S. C.

(*s*) 2 Saund. 3: *Buddle v. Wilson*, 6 T. R. 373.

(*t*) *Lloyd v. Williams*, 2 M. & Sel. 484: *Buddle v. Wilson*, 6 T. R. 369.

(*u*) Clift. 18, pl. 46: 19, pl. 50; 20, pl. 53, 54: *Bartelot v. Burton*, 1 Lutw. 23.

(*x*) *Dacres v. Duncomb*, 1 Vent. 236.

(*y*) See 2 Saund. 2 b.

(*z*) *Ante*, Vol. I. 196.

(*a*) See form. Chit. Forms, 443.

(*b*) Id. R. H., 2 W. 4, r. 1, s. 34, *ante*, Vol. I. 179.

If the grantee of a rent-charge avow upon several under-tenants for the same rent, the court will, upon a tender pleaded by the under-tenants, make an order, that the payment of the rent into court in one action shall serve for all (c). Although a party cannot proceed for damages on a plea of tender, after taking the money out of court, yet, on a plea of tender to an avowry for rent, the plaintiff need not bring the money into court (d).

CHAP. II.
SECT. 2.
Tender.

Nonpros for Want of Plea in Bar.] The judgment of *nonpros* in this case, at common law, is, that the defendant shall have a return of the goods (e). But, if the distress were for rent, customs, services, or damage *feasant*, the defendant shall have judgment for his damages (f); and, consequently, after the entry of the judgment of *nonpros* on the roll, follow the award of a writ of inquiry to ascertain the damages, (in the same manner as in ordinary cases upon a judgment by default), the sheriff's return of the inquest, and final judgment (g). In this case, also, the plaintiff may sue out a writ of second deliverance (h); but it will be a *supersedeas* of the writ *de retorno habendo* only, and not of the writ of inquiry (i).

Nonpros for
Want of.

Or, if the replevin were of a distress for rent, the defendant may enter his judgment, and execute a writ of inquiry, under stat. 17 C. 2, c. 7, s. 2, in the manner directed *ante*, 800, for want of a declaration, excepting that the entry of a suggestion, in nature of an avowry, must, of course, be omitted: and you therefore enter the prayer for the writ of inquiry, &c., immediately after the judgment for a return (k).

Suggestion
and Inquiry

Or the defendant, instead of executing a writ of inquiry, may, after signing judgment of *nonpros*, take an assignment of the replevin-bond, and proceed thereon (l).

Proceedings
on Bond.

Issue.] Let the issue be drawn up and delivered as directed, *Vol. I.* 199, &c.; but let the form of it be as directed *ante*, 756, 757, with reference to proceedings by original, in ejectment, &c. (m). Either plaintiff or defendant may make it up, and enter it when necessary, both parties in replevin being deemed actors (n).

Issue.

Proceedings on Demurrer.] The proceedings upon demurrer in replevin are the same as in ordinary cases; the only thing necessary to be mentioned here is the judgment. At common law, the judgment for the defendant is, that he have a return of the goods irreplevisable (o). But, if the distress were for

Proceedings
on Demurrer.

(c) *Anon.*, L. Raym. 429.

(d) Bull. N. P. 60; Woodf. L. & T. by Harrison, 769.

(e) See the form, Chit. Forms, 438; and of writ *de retorno habendo* thereon, Id. 438; and of *fi. fa.* or *ca. sa.* for costs, Id. 439.

(f) 21 H. 8, c. 19.

(g) See the form, Chit. Forms, 439; of writ of inquiry thereon, Id. 440; of notice of inquiry, Id.; of inquisition, Id.; of entry thereof upon the roll, Id.; of writ *de retorno habendo* thereon, Id.; and of *fi. fa.* or *ca. sa.* for damages and costs, Id. 441.

(h) See form, Chit. Forms, 427.

(i) *Anon.*, Latch, 72; *Argoll v. Cheney*, Palm. 403; *Pratt v. Rutledge*, 1 Salk. 95.

(k) See the form of the entry, Chit. Forms, 442; and of writ of inquiry, Id.; of notice of inquiry, Id. 443; of the inquisition, Id.; of entry thereof upon the roll, Id.; and of *fi. fa.* or *ca. sa.* thereon, Id. And see *Turnor v. Turner*, 2 B. & B. 107; 4 Moore, 606, S. C.

(l) *Waterman v. Yea*, 2 Wils. 41; *Turnor v. Turner*, 2 B. & B. 107; 4 Moore, 606, S. C.; *ante*, 801.

(m) See as to the form, Chit. Forms, 448.

(n) Vol. I. 203.

(o) 14 H. 7, 9 b; 2 Inst. 340; Co. Ent.

BOOK III.
PART I.

rent, customs, services, or damage *feasant* (*p*), an inquiry of damages and costs is awarded (*q*). The defendant thereupon sues out a *retorno habendo*, and an inquiry of damages, either in the same writ (*r*), or in separate writs (*s*); and upon the return of the writ of inquiry, final judgment is entered to recover, as well the damages and costs assessed by the jury, as the costs assessed by the court (*t*). No writ of second deliverance lies after judgment upon demurrer.

Inquiry as to
Arrears of
Rent after
Judgment for
Defendant.

Or, if the distress were for *rent*, then, after judgment given for the avowant, or person making consuance, the court may award a writ of inquiry, to inquire of the value of the distress (of the execution of which writ of inquiry fifteen days' notice must be given to the plaintiff's attorney or agent (*u*)); and, upon the return thereof, if the value of the distress be greater than the amount of the rent in arrear, the defendant shall have judgment to recover the arrears, and full costs; but, if the value of the distress be less than the arrears, then he shall have judgment to recover the value of the distress, and full costs (*x*). The stat. 17 C. 2, c. 7, s. 3, does not require, in this case, that the inquiry shall be as to the arrears of rent (*y*). In this case, no writ *de retorno habendo* issues.

Judgment for
Plaintiff.

The judgment for plaintiff, on demurrer, is the same as in the action of trespass (*z*).

Staying Pro-
ceedings on
Payment into
Court, &c.
By Plaintiff.

Staying Proceedings on Payment into Court, &c.] If the defendant avow or make consuance for rent, the court, upon application by the plaintiff, will stay the proceedings, upon the rent and all the costs up to that time being paid into court (*a*). But they will not do so, where the damages are unliquidated,—as, where the defendant avows &c. for damage *feasant* (*b*).

By Defen-
dant.

Upon the application of the defendant, also, even before the 3 & 4 W. 4, c. 42, s. 21, the court have stayed the proceedings, upon payment of the costs of the action and of the costs of replevying, and upon giving up the replevin-bond, where no special damage was laid in the declaration (*c*); and since that act money may be paid into court as in other cases (*d*).

Discontinuing
—Withdraw-
ing Plea in
Bar, &c.

Discontinuing—Withdrawing Plea in Bar, &c.] The defendant cannot have a rule to discontinue, &c., for though he be an actor in the suit, yet still it is the plaintiff's suit (*e*). The court will not, after issue joined upon a plea in bar, suffer the plea to be withdrawn, and the avowry confessed,

591 a. And see the form, Chit. Forms, 444.

(p) 21 H. 8, c. 19.

(q) See as to the form, Chit. Forms, 446.

(r) See the form, Thes. Brev. 220.

(s) See the forms, Lil. Ent. 600: Chit. Forms, 444, 445.

(t) 1 Saund. 195, n.

(u) *Burton v. Hickey*, 1 Marsh. 444; 6 Taunt. 57, S. C.

(x) 17 C. 2, c. 7, s. 3. See the forms, Chit. Forms, 445, 446. And see 1 Saund. 195; 2 Id. 286.

(y) See 2 Saund. 286.

(z) See ante, 665.

(a) *Vernon v. Wynne*, 1 H. Bl. 24; *Hopkins v. Shrole*, 1 B. & P. 382; and see *Davis v. Prince*, Barnes, 429. In two recent instances judges at chambers have allowed the payment into court of part of the rent distrained for, making an order that defendant proceed at the peril of costs if he does not prove a greater sum due.

(b) *Anon.*, 8 Mod. 379.

(c) *Banks v. Brand*, 3 M. & Sel. 525; see *Hodgkinson v. Snibson*, 3 B. & P. 603, cont.

(d) See post, Book IV. Part I. Ch. 9.

(e) *Long v. Buckeridge*, 1 Str. 112.

without consent, for the avowant would lose his costs(*f*). See further as to discontinuing, *post*, Book IV. Part I. Ch. 19.

CHAP. II.
SECT. 2.

Trial, &c.] After giving notice of trial, the plaintiff (or, if he neglect to do it, the defendant) may make up the *Nisi Prius* record, as directed ante, 758, with reference to proceedings in ejectment by original, and sue out jury process, enter the cause for trial, and proceed to verdict or nonsuit, as in ordinary cases(*g*). Inasmuch as both parties in replevin are deemed actors, when the record is carried down for trial by the defendant, it is not necessary to have the proviso in the *distringas*, as in cases of trial by proviso(*h*), although, in practice, it is usually inserted(*i*). For the same reason, the defendant, in replevin, cannot have judgment as in case of a nonsuit(*k*); but, if either plaintiff or defendant give notice of trial, and afterwards do not proceed to try the cause, or countermand their notice in time, the opposite party will be entitled to costs, as in ordinary cases(*l*).

If a verdict be found for the plaintiff, the jury assess the damages(*m*), as in a verdict for plaintiff in trespass, &c.(*n*). If it be found for the defendant, the jury, at common law, find the issues specially for the defendant, and the judgment is, that he have a return of the goods irreplevisable(*o*). But, if the distress were for rent, customs, services, or damage *feasant*, then the jury may assess damages for the defendant(*p*); and the judgment then is, not only for a return of the goods, but for the damages and costs also(*q*). Or, if the distress were for rent, and the defendant wish that the finding should be according to the 17 C. 2, c. 7, s. 2, the jury find the amount of the rent in arrear, and the value of the things distrained; and the defendant shall have judgment for such arrears, or so much thereof as the value of the goods or cattle distrained amount to together with full costs, and shall have execution thereupon(*r*). If the jury, in finding a verdict generally for defendant, omit to assess damages according to the statutes of H. 8, the omission may be supplied by a writ of inquiry(*s*). But, if the jury find according to stat. 17 C. 2, c. 7, s. 2, an omission in their verdict cannot be supplied by such writ(*t*); although, in such a case, the court would probably allow the defendant to enter his judgment for a return at common law, or allow him to amend it, if already

Trial, &c.

The Verdict.

(*f*) Com. Dig., Pleader, 3 K. 20.

(*g*) See as to the form of *Nisi Prius* record, Chit. Forms, 448; and of jury process, Id.

(*h*) Reg. v. Banks, 2 Salk. 652.

(*i*) Jones v. Concannon, 3 T. R. 661; Eggleton v. Smart, 1 W. Bl. 375.

(*k*) Jones v. Concannon, 3 T. R. 661; Shortridge v. Hiern, 5 T. R. 400; Eggleton v. Smart, 1 W. Bl. 375.

(*l*) See Book IV. Part I. Ch. 23, 24.

(*m*) Usually, no more than the costs of the replevin-bond (about 4*l.* 4*s.*) are given as damages. But special damages, if alleged in the declaration, may, it should seem, be recovered.

(*n*) See form of the *postea*, Chit. Forms, 449; of the judgment and execution, Id.

(*o*) See the forms of *postea*, &c., on this verdict, Chit. Forms, 450, 451.

(*p*) 7 H. 8, c. 4, s. 3; 21 H. 8, c. 19, s. 3.

(*q*) See form of *postea*, Chit. Forms, 450; judgment, Id.; writ de retorno habendo, Id.; *fi. fa.* or *ca. sa.* for damages and costs, Id. 453.

(*r*) See form of *postea*, Chit. Forms, 453; judgment, Id.; and execution, Id. See Turnor v. Turner, 2 B. & B. 107; 4 Moore, 606, S. C.

(*s*) Herbert v. Waters, Carth. 362; 1 Salk. 205, S. C.; Pratt v. Rutledge, Id. 95; Harcourt v. Weeks, 5 Mod. 77; Dewell v. Marshall, 2 W. Bl. 921; 3 Wils. 442, S. C.

(*t*) Sheape v. Culpeper, 1 Lev. 255; 1 Sid. 380; T. Raym. 170; 1 Vent. 40, S. C.; Herbert v. Waters, 1 Salk. 205; 2 L. Raym. 59, S. C.; Kinaston v. Mayor of Shrewsbury, Hardw. 297, 298; 2 Str. 1052, S. C.; Rees v. Morgan, 3 T. R. 349; see Freeman v. Atcher, 2 W. Bl. 763.

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entered(*u*); or, if the jury have assessed damages, but not the amount of the rent, the defendant may have leave to enter his judgment, as a judgment under stat. 21 *H.* 8, c. 19(*x*).

Judgment for
Defendant on
Nonsuit.

If the plaintiff be nonsuit, the defendant, at common law, has judgment to have a return of the goods(*y*). But, if the distress were for rent, customs, services, or damage *feasant*, then the jury may inquire of the defendant's damages(*z*); and the judgment is then not only for a return of the goods, but for the damages and costs also(*a*). Or, if the distress were taken for rent, then, at the prayer of the defendant, the jury shall inquire of the amount of the arrears, and the value of the distress(*b*), in the same manner as where a verdict is given for the defendant; and he shall have judgment to recover the arrears and his costs, if the value of the distress be found to equal or exceed such arrears; but, if the value of such distress do not equal the arrears, then he shall have judgment to recover the value of the distress and his costs(*b*).

Second Deliv-
erance after.

As the judgment at common law in this case is not for a return of the goods irreplevisable, the plaintiff may sue out a writ of second deliverance, and proceed upon it, as mentioned *ante*, 799. This writ will be a *supersedeas* of the writ *de retorno habendo*; but the defendant is not precluded by it from levying the damages and costs awarded to him by the judgment.

New Trial.

New Trial.] In replevin, where the verdict is for the plaintiff, the court will not, in general, grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs(*c*). See further as to new trials, *post*, *Book IV. Part I. Ch. 27*.

Costs.

Costs.] If the plaintiff have a verdict, he is entitled to costs of increase, by the stat. of Gloucester, (6 *Edw.* 1, c. 1, s. 2), in the same manner as in all other actions in which a plaintiff recovers damages(*d*).

So, if the defendant, in replevin, or second deliverance, making avowry, cognizance, or justification for rents, customs, or services, or for damage *feasant*, have a verdict, or the plaintiff be nonsuit or otherwise barred, he is entitled to costs by 7 *H.* 8, c. 4, s. 3, & 21 *H.* 8, c. 19, s. 3(*e*). And by 17 *C.* 2, c. 7, s. 2, in replevin of a distress for rent, if the defendant have judgment upon this act, he shall have full costs of suit. And, lastly, where the distress is for rent, relief, heriot,

(*u*) *Rees v. Morgan*, 3 T. R. 349: *Herbert v. Waters*, Carth. 362: *Sheape v. Culpeper*, *ante*, 807, n. (t).

(*x*) *Gamon v. Jones*, 4 T. R. 509.

(*y*) See form of the *postea*, judgment, and writ of *retorno habendo*, Chit. Forms, 454.

(*z*) 21 *H.* 1, c. 19, s. 3.

(*a*) See form of *postea*, Chit. Forms, 454; judgment, *Id.* 455; and execution, *Id.*: and see *Turnor v. Turner*, 2 B. & B. 107; 4 Moore, 606, 616, S. C.

(*b*) 17 *C.* 2, c. 7, s. 2.

(*c*) *Parry v. Duncan*, 7 Bing. 243; 5 Moo. & P. 19, S. C.

(*d*) See *Butterton v. Furber*, 1 B. & B. 517; 4 Moore, 296, S. C.

(*e*) See *Turner v. Gallilee*, Hardr. 153: *Smith v. Walker*, 2 L. Raym. 788: Com. 122, S. C.: *Haselop v. Chaplin*, Cro. El. 330: *Samuel v. Hoder*, Cro. Jac. 520: *Porter v. Wray*, Cro. El. 301: *Davies v. James*, 1 T. R. 371: *Butterton v. Furber*, 1 B. & B. 517.

or other service, (not a rent-charge) (*f*), the defendant avowing, or making cognizance, in replevin, shall have *double* costs of suit, if the plaintiff be nonsuit, discontinue his action, or have judgment given against him (*g*). Such double costs are estimated by giving the defendant, first, the whole of his single costs, including expenses of witnesses, counsel, fees, &c., and then half of that amount (*h*). No suggestion is, it seems, requisite to entitle the defendant to these (*i*).

As to costs generally, see *post*, Book IV. Part I. Ch. 30. It does not appear that there is any difference as to the mode of taxation between a replevin and any other suit (*k*).

Execution.] The execution for the plaintiff is the same as in ordinary cases, where a plaintiff has a judgment for damages and costs, namely, by *fieri facias*, *ca. sa.*, or *elegit* (*l*). It may be questionable, however, whether these writs can be made returnable *immediately after the execution* thereof, as the Uniformity of Process Act, and the statute of 3 & 4 W. 4, c. 67, s. 2, passed to amend it, do not, perhaps, extend to a replevin suit. The practice is to make them so returnable.

So, if the defendant have judgment under stat. 17 C. 2, c. 7, to recover the arrears of rent, or value of the distress, he shall have execution by *fieri facias*, *ca. sa.*, or *elegit* (*m*).

But when the defendant has judgment at common law, he shall have execution by a writ *de retorno habendo*, to have a return of the things distrained, and a *fieri facias* or *ca. sa.* for his costs (*n*). Or, if the defendant have judgment, under stat. 21 H. 8, c. 19, he shall have a writ *de retorno habendo* for a return of the goods; and also a *fi. fa.* or *ca. sa.* for his damages or costs (*o*). It seems the writ *de retorno habendo*, and a *fi. fa.* or *ca. sa.* for the damages and costs, may be included in one writ. The sheriff is not bound to execute a writ *de retorno habendo*, unless some person attend on behalf of the defendant, to shew him the goods; and, it will be a good return to the writ, to say, that no person did attend (*p*). See the practical directions as to the mode of suing out and executing these writs of *fieri facias*, *ca. sa.*, or *elegit*, *ante*, Vol. I. 419, 420, 440, 449.

If, to the *retorno habendo*, the sheriff return that the goods, &c., are eloiigned (that is, conveyed to places unknown to him, so that he cannot execute the writ), the defendant may then sue out a *capias in withernam* (*q*), requiring the sheriff to take other cattle &c. of the plaintiff, to the value of the cattle &c. eloiigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver to him the cattle &c.

(*f*) *Leominster Canal Company v. M. & R.* 128, S. C. *Cowell*, 1 B. & P. 213; 7 T. R. 500, S. C.

(*g*) 11 G. 2, c. 19, s. 22: see *Lloyd v. Winton*, Barnes, 148; 2 Wils. 28, S. C.

(*h*) *Lindon v. Collins*, Willes, 429; *Gurney v. Buller*, 1 B. & Ald. 670; *Johnson v. Lawson*, 2 Bing. 341; 9 Moore, 642, S. C.

and as to costs upon double pleadings, see *Dodd v. Jodrell*, 2 T. R. 235: and see Book IV. Part I. Ch. 30.

(*i*) *Staniland v. Ludlam*, 4 B. & C. 889; 7 D. & R. 484, S. C.

(*j*) See *Wells v. Ody*, 3 Dowl. 800; 2 C., M. & R. 128, S. C.

(*k*) See *Spencer v. Hamerton*, 4 A. & E. 413.

(*l*) See the form, Chit. Forms, 148 to 200. See generally, Vol. I. 395 to 456.

(*m*) See the forms, Chit. Forms, 433.

(*n*) See the forms, Chit. Forms, 427, 438, 452, 454.

(*o*) See the form, Chit. Forms, 427, 450, 451, 452.

(*p*) 2 Saund. 74 b, c.

(*q*) *Anon.*, 2 Leon. 174. See the form, Chit. Forms, 428, 441.

Execution.
For Plaintiff.

For Defendant.

Writ de Retorno Habendo.

Proceedings on Return of Elongata.

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originally replevied. If this writ be returned *nihil*, the defendant may sue out an *alias*, and after that a *pluries*; and, if the *pluries* be returned *nihil*, the defendant may then sue out a *scire facias* against the plaintiff's pledges, to shew cause why the price of the cattle &c. eloigned should not be made of their lands and goods, and rendered to the defendant. If no cause be shewn to this *scire facias*, a writ issues to take the cattle &c. of the pledges. But if they have none, and the sheriff return *nihil* to the writ, the defendant may then have a *scire facias* against the sheriff himself, requiring him to shew cause why he shall not render to the defendant cattle &c. to the value of those eloigned (*r*). Or the defendant may, it should seem, proceed against the pledges by default, upon the *scire facias* above mentioned. Or, which is much the best and least circuitous method, if the sheriff have not taken pledges, or the pledges be insufficient, the defendant, upon the return of the *elongata*, may bring an action on the case against the sheriff, and recover damages, whether a *scire facias* have issued against the pledges or not (*s*).

5. *Proceedings against the Sureties in the Replevin-bond.*

5. Proceed-
ings against
the Sureties
in the Reple-
vin-bond.

We have seen, *ante*, 792, that the sheriff in every replevin for a distress for rent is bound to take from the party replevying, a bond, with sureties, to prosecute the replevin suit with effect and without delay, and for returning the goods distrained, if a return be awarded. We shall now proceed to consider how that bond may be forfeited, and what proceedings may be taken thereon, against the sureties, by the defendant in the replevin suit.

Replevin-
bond, when
and how for-
feited.

Replevin-bond, when and how forfeited.] The replevin-bond is forfeited by not prosecuting the replevin suit with success, as well as by making default in the prosecuting of it: therefore, you may sue the pledges on their bond, or the sheriff for not taking pledges or not taking sufficient pledges, without suing out a *retorno habendo* (*t*); unless in the case of a distress damage *feasant* (*u*). The plaintiff in replevin, by not appearing in the county court immediately succeeding the execution of the replevin-bond, and then entering his plaint there, creates a forfeiture of the bond (*x*). So the bond will be forfeited if the plaintiff delay, or does not use due diligence in prosecuting the suit; as, if he delay proceeding for two years (*y*), or even for a less time, and though the suit be not determined (*z*). The bond may be forfeited notwithstanding the removal of the cause into the superior court (*a*). But the bond is not forfeited by the plaintiff's not declaring in the county court, if the defendant has not appeared therein to

(*r*) *Trevors v. Michelborne*, Hut. 77; 1 Saund. 195, n. (3).

(*s*) 16 Vin. Abr. 399, 400: *Richards v. Acton*, 2 W. Bl. 1220: *Tesseyman v. Gildart*, 1 New Rep. 292: *Page v. Eamer*, 1 B. & P. 378; and see *Turnor v. Turner*, 2 B. & B. 107; 4 Moore, 606, 616, S. C.

(*t*) *Perreau v. Bevan*, 8 D. & Ry. 72; *Morgan v. Griffith*, 7 Mod. 381.

(*u*) *Hucker v. Gordon*, 1 C. & M. 58.

(*x*) *Dias v. Freeman*, 5 T. R. 195.

(*y*) *Axford v. Perrett*, 1 Moo. & P. 470; 4 Bing. 586, S. C.: and see *Dias v. Freeman*, 5 T. R. 195.

(*z*) *Harrison v. Wardle*, 5 B. & Ad. 146.

(*a*) *Gwillim v. Holbrook*, 1 B. & P. 410; *Waterman v. Yea*, 2 Wils. 41.

the summons (*h*). And if the plaintiff enter his plaint, and afterwards be restrained by injunction till his death, whereby the plaint abates, the bond will not be forfeited (*c*). So, if the plaintiff dies before the termination of the suit, it will abate, and the bond will not be forfeited (*c*).

Assignment of, and Action on the Bond.] The sheriff is directed by the statute 11 G. 2, c. 19, s. 23, to assign the bond to the avowant, or person making cognizance (*d*), in the same manner as a bail-bond is assigned; and the party afterwards may bring an action on the bond, if forfeited, in his own name; and the court may, by rule, give such relief to the parties as may be agreeable to justice and reason. The sheriff is liable to an action on the case if he refuse to assign the bond; and this liability extends to a bond in a replevin of cattle taken damage feasant (*e*). The bond may be assigned four days exclusive after the time limited therein for the plaintiff to prosecute his suit (*f*).

Assignment of, and Action on the Bond.

Assignment, how and when made.

The bond may be assigned to both the avowant and the person making cognizance, and they may sue upon it jointly (*g*). Where the avowant was the person really interested, and the person making cognizance a mere man of straw, the court held that it might be assigned to the avowant only (*h*). If there be no avowant, the bond may be assigned to the person making cognizance (*i*). Where the plaintiff neglects to prosecute his suit in the court below, the defendant is entitled to an assignment of the bond, though he has not avowed or made cognizance (*k*).

To whom.

An action may be commenced by the assignee immediately on the assignment and forfeiture of the bond. This remedy is not affected by the 17 C. 2, c. 7, notwithstanding defendant proceeds under that act (*l*). The action may be brought in any of the superior courts of law, though the replevin suit did not proceed further than in the county court (*m*). And when removed by *re. fa. lo.*, it may (notwithstanding an old authority to the contrary) be brought in any of the superior courts, and it is not confined to the court in which the *re. fa. lo.* was returnable (*n*).

Action, when and in what Court brought.

The court or a judge will order the proceedings in an action on the replevin-bond to be stayed on payment into court of the value of the goods distrained and costs (*o*). Or if the value of the goods exceed the amount of the rent due at the time of the distress, then it would seem on payment of the rent due

Staying Proceedings on Payment of Value of Goods or Rent due, &c.

(*b*) *Seal v. Phillips*, 3 Price, 17.

(*c*) *Ormond (Duke of) v. Brierly*, Carth. 519; 12 Mod. 380, S. C.

(*d*) See *Dias v. Freeman*, 5 T. R. 195; *Middleton v. Sandford*, 4 Camp. 36; *Page v. Eamer*, 1 B. & P. 378. See the form of assignment, Chit. Forms, 416. And see Vol. I. 547.

(*e*) See *per Holroyd, J.*, in *Perreau v. Bryan*, 5 B. & C. 305, in commenting on *Coombes v. Cole*, Rep. Temp. Hardw. 352.

(*f*) 2 Sel. Prac. 266.

(*g*) *Phillips v. Price*, 3 M. & Sel. 180.

(*h*) *Archer v. Dudley*, 1 B. & P. 381, n.

(*i*) See *Page v. Eamer*, 1 B. & P. 378.

(*k*) See *Dias v. Freeman*, 5 T. R. 195; *Middleton v. Langford*, 4 Camp. 36.

(*l*) *Gilb. Replevin*, 225; *Waterman v. Yea*, 2 Wils. 41; *Turnor v. Turner*, 2 B. & B. 107; 4 Moore, 606, S. C.; *Perreau v. Bevan*, 8 D. & Ry. 72.

(*m*) *Dias v. Freeman*, 5 T. R. 195; *Brackenbury v. Pell*, 12 East, 585.

(*n*) *Nelson (or Wilson) v. Hartley*, 7 Dowl. 461.

(*o*) *Gingell v. Turnbull*, 3 Bing. N. C. 881. The value was, in that case, ordered to be ascertained by the prothonotary.

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and costs (*p*). And if in such a case the amount of rent due be disputed, then the court or a judge would perhaps, as in other cases of liquidated claims (*q*), allow the defendants to pay into court the sum admitted by them to be due, and order that the plaintiff should proceed at the peril of costs if he do not prove a greater sum due. If separate actions be brought against the sureties, the court would probably stay proceedings upon payment of the sum recoverable, and the costs in one action (*r*).

Setting aside
irregular Pro-
ceedings.

The proceedings may, if irregular or defective, be set aside on application to the court or a judge, as in other cases. (*See post, Book IV. Part I. Chap. 17*). The court will not, it seems, set the proceedings aside, because the action is commenced before the forfeiture of the bond, for that may be pleaded (*s*). Nor will they set aside an execution therein upon an objection which might have been taken before judgment (*t*).

Sureties, how
far liable.

The plaintiff may, in general, recover to the extent of the penalty. Where separate actions were brought against each of the pledges, it was holden that the plaintiff could recover, from both, damages only to the amount of the penalty, and from each the costs in the separate action against him individually (*u*). If the distress were for rent, they are not, either jointly or separately, liable beyond the amount of the rent in arrear at the time of the distress, and costs (*x*); and they are only liable for the value of the goods seized, and double costs; and if that exceeds the amount of rent due, they will be liable only for the rent (*y*). Where a sheriff took a replevin-bond with one surety only, and was sued for taking insufficient pledges, in which action the plaintiff recovered damages and costs, it was held that the sheriff could not recover against the surety the costs of defending such action, nor more than a moiety of the damages awarded, the surety being deprived of calling on a co-surety for contribution (*z*).

How dis-
charged.

It may be necessary here to mention, that pledges in replevin cannot *plead* to an action on the replevin-bond, that they are discharged by a reference to arbitration (*a*), or by time having been given to the plaintiff in replevin (*b*). But though they cannot so *plead*, nevertheless the court might, on application by *motion* in such cases, relieve them: and where the plaintiff and defendant in replevin, without the privity of the pledges, agreed to refer the cause to arbitration, and that the replevin-bond should stand as a security for the performance of the award, the court relieved the pledges (*c*). The pledges are not discharged by the defendant's taking a verdict

(*p*) See *Hunt v. Round*, 2 Dowl. 558.

(*q*) See *Gower v. Elkins*, 6 Dowl. 335: *Parsons v. Pitcher*, 6 Dowl. 432.

(*r*) See *Key v. Hill*, 2 B. & A. 598: *Hefford v. Alger*, 1 Taunt. 218.

(*s*) *Anon.*, 5 Taunt. 776.

(*t*) *Short v. Hubbard*, 10 Moore, 107; 2 Bing. 445, S. C.

(*u*) *Hefford v. Alger*, 1 Taunt. 218.

(*x*) *Ward v. Henley*, 1 Y. & J. 295.

(*y*) *Hunt v. Round*, 2 Dowl. 558.

(*z*) *Austen v. Howard*, 1 Moore, 68; 7 Taunt. 28, S. C.; *Id.* 327; 2 Marsh. 352.

S. C.

(*a*) *Moore v. Bowmaker*, 7 Taunt. 97; 7 Price, 223; 2 Marsh. 392, S. C.: *Aldridge v. Harper*, 10 Bing. 118; 3 Moo. & Sc. 518, S. C.; and see *Hallett v. Mountstephen*, 2 D. & Ry. 343.

(*b*) *Moore v. Bowmaker*, 6 Taunt. 379.

(*c*) *Archer v. Hale*, 1 Moo. & P. 285; 4 Bing. 464, S. C.; and see *Aldridge v. Harper*, 10 Bing. 124; 3 Moo. & Sc. 518, S. C.: *Bank of Ireland v. Beresford*, 6 Dow. 238; *Donnelly v. Dunn*, 2 B. & P. 45.

and judgment for the arrears of rent, &c., under the 17 C. 2, c. 19, ss. 2, 3 (d).

CHAP. II.
SECT. 2.

6. Proceedings against the Sheriff.

If the sheriff neglect to take a bond, he is not liable to an attachment; but the defendant, if damnified, may have his remedy against him by action on the case (e). So he may have an action on the case against the sheriff for taking insufficient pledges, and may therein recover damages to the extent of the penalty of the bond (f). And this, it seems, without getting a return of *elongata* to the writ *de retorno habendo*, or without even suing out that writ (g). The high-sheriff, under-sheriff, and replevin clerk, are all answerable to the defendant for the sufficiency of the pledges *de retorno habendo* (h). The sheriff, however, is not liable for taking insufficient pledges if they were apparently responsible at the time of the taking the bond (i): but if the sheriff had notice of the fact of their insufficiency, or neglected the means in his power of knowing it, and did not use a reasonable degree of caution in deciding upon their sufficiency, he would be liable; and it is for the jury to say whether he used such caution or not (k). If a person known to the sheriff make inquiries as to the credit or reputation of a tradesman, and the value of his stock, and communicate the result of such inquiry to the sheriff, if it be favourable, the latter need not make a personal inquiry (l). And in a recent case it was held that the sheriff or replevin clerk is not bound to go out of the office to make inquiries; but if the sureties are unknown to him, he ought to require information beyond their own statement as to their sufficiency (m). And, where persons of respectable appearance were brought to the replevin clerk as sureties, by the attorney's clerk, on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter caused the sureties to make affidavit in detail as to their sufficiency, with which he was satisfied, and an action was afterwards brought against the sheriff for taking insufficient sureties, it was considered that the jury might properly find that the inquiry made did not excuse the sheriff (n). The sheriff is, it seems, liable in this respect, if one of the sureties was insufficient (o). The sureties themselves may be witnesses to prove whether they were sufficient or not (p).

6. Proceedings against the Sheriff.

(d) *Turnor v. Turner*, 2 B. & B. 107; 4 Moore, 606, 616, S. C.

(e) *R. v. Lewes*, 2 T. R. 617; 1 Saund. 195.

(f) See *Jeffery v. Bastard*, 4 A. & E. 823; *Evans v. Brander*, 2 H. Bl. 547; *Baker v. Garrett*, 3 Bing. 59; 10 Moore, 324, S. C.; *Paul v. Goodluck*, 2 Bing. N. C. 220. According to *Yea v. Lethbridge*, (4 T. R. 433), the plaintiff cannot recover beyond the value of the goods distrained. (See *Concanen v. Lethbridge*, 2 H. Bl. 36; *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27, S. C.; *Sutton v. Waite*, 8 Moore, 27). He is not bound to take more than one pledge on a replevin for distraining cattle damage *feasant*. (*Hucker*

v. Gordon, 1 C. & M. 58.

(g) *Perreau v. Bevan*, 5 B. & C. 284.

(h) *Richards v. Acton*, 1 W. Bl. 1220.

(i) *Hindle v. Blades*, 1 Marsh. 27; 5 Taunt. 225, S. C.

(k) *Jeffery v. Bastard*, 4 A. & E. 823; *Scott v. Waithman*, 3 Stark. 168; 1 Phil. Ev. 433; and see *Gwillim v. Scholey*, 6 Esp. 100.

(l) *Sutton v. Waite*, 8 Moore, 28.

(m) *Jeffery v. Bastard*, 4 A. & E. 823; 6 Nev. & M. 303, S. C.

(n) *Jeffery v. Bastard*, 4 A. & E. 823.

(o) *Scott v. Waithman*, 3 Stark. 168.

(p) 1 Saund. 195 g. (n.): *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27, S. C.

Taking an assignment of the replevin-bond is not a waiver of your remedy against the sheriff; and therefore, if, after proceeding against the pledges, you find them insufficient, you may still bring your action against the sheriff for taking insufficient pledges (*q*).

(*q*) 1 Saund. 195 e: and see *Baker v. Garratt*, 3 Bing. 56; 10 Moore, 324, S. C.

CHAPTER III.

SCIRE FACIAS.

SECT. 1. *What, and in what Cases requisite, 815 to 829.*

2. *Proceedings upon, 829 to 837.*

SECT. 1.

What, and in what Cases requisite.

CHAP. III.
SECT. I.

A *SCIRE FACIAS* is a judicial writ, founded upon some record, and requiring the person against whom it is brought to shew cause why the party bringing it should not have advantage of such record, or (as in the case of a *scire facias* to repeal letters-patent) why the record should not be annulled and vacated. It is considered in law, however, as an action, and in the nature of a new original (*a*); and, when brought to repeal letters-patent, may in fact be an original writ, returnable in Chancery (*b*), or a judicial writ returnable in the superior court (*c*). The *scire facias* against bail on their recognisances, against pledges in replevin, to repeal letters-patent, or the like, is in fact an *original proceeding*; but when brought to revive a judgment after a year and a day, or upon the death, marriage, or bankruptcy, &c., of parties, or when brought on a judgment in debt on bond, or on a judgment *quando* &c., against an executor, it is but a *continuation* of the original action (*d*). In some cases it is merely an *interlocutory proceeding*, and in the nature of process, as in the case of a *scire facias quare executionem non*, and *scire facias ad audiendum errores*, when those writs were in force; sometimes a proceeding after the action has terminated, as in the case of *scire facias quare restitutionem non*, and *scire facias ad rebandam terram*.

It is a general rule that where a new person, who was not a party to a judgment or recognisance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognisance (*e*). In some cases, however, a *scire facias* is not neces-

Where a Stranger is to be affected by the Judgment.

(a) *Woodyear v. Gresham*, Skin. 682; debt, see *Att. Gen. v. Sewell*, 4 M. & W. Comb. 455, S. C.; *Winter v. Kretchman*, 77; 6 Dowl. 673; 8 C. & P. 376, S. C. 2 T. R. 46; *Fenner v. Evans*, 1 Id. 267.

(c) 3 H. 4, 6, 29.

(b) See the form, Tidd's Forms, 426; also a form of *scire facias* for the Queen on a bond, and declaration, Id. 424. As to when her majesty must proceed by

(d) See *Executors of Wright v. Nutt*, 1 T. R. 388.

scire facias, and not by information of (e) 2 Saund. 6, n. 1; *Penoyer v. Brace*, 1 Salk. 319; 1 L. Raym. 245.

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sary for this purpose; for instance, where an act of parliament allows a company to be sued in the name of an individual, and expressly renders the members liable to execution on the judgment obtained in an action against that individual; it is sufficient, previously to issuing execution against a member, to suggest on the record, by leave of the court, the facts which render him liable, without making him a party to the record by *scire facias* (f).

Limitation
of by Statute.

A *scire facias*, being founded on matter of record, was not within the Statute of Limitations, 21 Jac. 1, c. 16, s. 3. But now, by the Law Amendment Act, 3 & 4 W. 4, c. 42, s. 3, a *scire facias*, upon a recognisance, is included in the limitation of actions therein prescribed: viz. ten years after the then session of parliament, or twenty years after the cause of action or suit, but not after. And the effect of the 3 & 4 W. 4, c. 27, s. 40, upon the proceeding by *scire facias* on a judgment, appears to be that no *scire facias* can be sued out to revive a judgment, unless within twenty years next after a present right to receive the sum due on the judgment shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and that even in such case no such proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given. But it would seem that this section does not apply to judgments on which a *scire facias* has been sued out, and judgment obtained thereon within twenty years; and if the statute were pleaded to a *scire facias* to revive such a judgment, it seems, from analogy to the cases decided on the Statute of Limitations, that the intermediate *scire facias* and judgment thereon might be replied.

Is within R.
H. T., 4 W. 4.

A *scire facias* is within the rules of H. T., 4 W. 4, when it is a continuation of the original action, and that action was within those rules (g).

In what Cases
necessary.

As to the cases in which a *scire facias* is necessary, they shall be considered under the following heads:—

1. *Scire Facias, to revive a Judgment after a Year and a Day*—817.
2. *Scire Facias, upon the Death of Parties*—819.
3. *Scire Facias, upon the Marriage of Feme Plaintiff or Defendant*—824.
4. *Scire Facias, upon the Bankruptcy, &c., of Parties*—825.
5. *Scire Facias, on a Judgment in Debt on Bond*—827.
6. *Scire Facias, on a Judgment quando &c., against an Executor*—*id.*
7. *Scire Facias, in other Cases*—828.

1. Scire Facias, to revive a Judgment after a Year and a Day.

When a year and day have elapsed after judgment is signed, without execution being sued out upon it (*g*), the law presumes that the judgment has been executed, or that the plaintiff has released the execution; and therefore it is that a *scire facias* is required in such a case, in order to give an opportunity to the defendant to shew that the judgment has been already executed, or other cause, if he can, why execution should not issue against him (*h*). This is necessary even in the case of an *elegit*, notwithstanding an old case to the contrary (*i*). And so strict is the rule in this respect, that a plaintiff cannot sue out a *ca. sa.* after the year, even for the purpose of proceeding against the bail, without having first revived the judgment against the principal by *scire facias* (*j*). At common law, a judgment in a personal action could not be revived, after a year and a day, by *scire facias*, but the only remedy the plaintiff had was to bring an action of debt on the judgment (*k*); in real actions (*l*), as also in mixed actions (*m*), it was otherwise. By stat. *Westm.* 2, (13 *Ed.* 1), c. 45, however, all matters enrolled, to which the court can give effect, shall have such force, that it shall no longer be necessary to implead upon them; but if the plaintiff come into court within a year, he shall have execution forthwith; or if he come after the year, a *scire facias* shall issue to warn the defendant to appear and shew cause why the said matters enrolled should not be executed; and if he shew no cause, or if he do not appear, then the sheriff shall be commanded to cause the said matter enrolled to be executed. This statute has been holden to extend to judgments in ejectment (*n*), as well as in personal actions; and indeed, from the general manner in which it is worded, it should seem to include judgments in every species of action, real, personal, and mixed. The year mentioned in the statute must be computed, not by terms, but by calendar months (*o*), and from the time of the signing of the judgment (*p*).

A *scire facias*, however, is not necessary to revive a judgment for the queen (*q*).

Also, if the plaintiff have been prevented from suing out execution, by a writ of error (*r*), or injunction (*s*), or by having a judgment with a *cesset executio* for a certain time (*t*),

1. Scire Facias, to revive a Judgment after a Year and a Day.
When necessary.

Not necessary for Queen.

Nor where Plaintiff unable to issue Execution

(*g*) If a writ of execution be issued within the year and day returnable immediately after execution, it will remain in force until executed. (*Simpson v. Heath*, 7 Dowl. 832).

(*h*) 2 Inst. 470: 2 Bac. Abr., Execution, H.

(*i*) *Putland v. Newman*, 6 M. & Sel. 179.

(*j*) *Cholmondeley v. Bealey*, 2 L. Raym. 1096: *Cholmley v. Feal*, 6 Mod. 304.

(*k*) 2 Inst. 469: Co. Lit. 290. b.

(*l*) 2 Inst. 470: *Booth v. Booth*, 6 Mod. 288: *Withers v. Harris*, 7 Mod. 64, 66.

(*m*) *Withers v. Harris*, 1 Salk. 258; 2 Id. 600; 7 Mod. 64; 2 L. Raym. 806, S. C.: *Proctor v. Johnson*, 1 L. Raym. 669.

(*n*) *Withers v. Harris*, 1 Salk. 258; 3 Id. 319; 2 L. Raym. 806, S. C.: *Underhill v. Devereux*, 2 Saund. 72: see *per Bayley, J.*, in *Putland v. Newman*, 6 M. & Sel. 181.

(*o*) *Winter v. Lightbound*, 1 Str. 301.

(*p*) *Simpson v. Gray*, Barnes, 197. See the forms of writ to revive a judgment for plaintiff, Chit. Forms. 458; the like, to revive a judgment for defendant, Id. 461.

(*q*) *Anon.*, 2 Salk. 603: *Burr v. Attwood*, 1 L. Raym. 328.

(*r*) 2 Inst. 471: 5 Co. 88: Ro. Abr. 899: *Winter v. Lightbound*, 1 Str. 301: *Booth v. Booth*, 6 Mod. 288: 1 Salk. 322, S. C.: *Adams v. Savage*, 3 Id. 321.

(*s*) *Michel v. Cue*, 2 Burr. 660; and see Tidd, 9th ed. 1105: *Powis v. Powis*, 6 Moore, 517; but see *Winter v. Lightbound*, 1 Str. 301: *Booth v. Booth*, 1 Salk. 322; 3 P. Wms. 36: Bac. Abr., Sci. Fa. C., *contra*.

(*t*) *Hiscocks v. Kemp*, 5 Nev. & M. 113: *Dillon v. Brown*, 6 Mod. 14: *Booth v. Booth*, Id. 288: *Withers v. Harris*, 7 Mod. 64; 2 Salk. 600; 2 L. Raym. 806, S. C.: *Belloes v. Hanford*, 1 Ro. Rep. 104: Tidd, 9th ed. 1104.

BOOK III.
PART I.within the
Year.Nor where
Writ of Er-
ror brought.Nor where
dispensed
with.Nor where
Execution
issued within
the Year.Nor on Judg-
ment under 1
& 2 V. c. 110,
s. 87.After Seven
Years, leave
of Court ne-
cessary.

or by agreement (*u*), the year and day do not begin to run until the writ of error is determined, the injunction dissolved, or the time for which the execution was stayed have elapsed, respectively.

And it has even been determined, that if a writ of error be brought after the year, and the judgment be affirmed (*x*), or the plaintiff be nonsuit, or the writ of error be discontinued (*y*), the party may sue out execution, without a *scire facias*, at any time within a year and a day from such determination of the writ of error; because the other party, by bringing error, has revived the judgment.

Also, by agreement, the parties may dispense with the necessity for reviving a judgment by *scire facias*, and a clause to this effect is frequently inserted in *cognovits* and warrants of attorney (*z*).

Also, according to a recent decision in the Court of Exchequer (*a*), if a writ of execution has been sued out within the year, it may be executed at any time after its date, even after the expiration of the year, provided it be before the return day; and a writ of execution returnable immediately after execution will continue in force until executed without being returned and filed within the year, or continued down by subsequent process, at least in actions commenced by the process prescribed by the 2 *W. 4, c. 39*. It was formerly holden, that if the plaintiff, after the year and day, enter an award of an *elegit* on the roll, as of the same term with the judgment, he might, when continuances were requisite, continue it down by *vicecomes non misit breve*, and sue out an *elegit*, without reviving the judgment by *scire facias* (*b*); and this appears to be warranted by the precedents (*c*). It was, however, decided in a subsequent case, that a *scire facias* is necessary to revive the judgment after a year and a day before an *elegit* can be sued out (*d*). It may be necessary here to remark a difference between entering mesne process on the roll, and writs of execution: in the former case, the writs must be all of the same species, in the latter not; thus, if a *fi. fa.* be sued out within the year, it will warrant a *ca. sa.* or *elegit* sued out afterwards (*e*).

Also, no *scire facias* is necessary to revive a judgment against an insolvent, on the warrant of attorney given before adjudication, under the 1 & 2 *V. c. 110, s. 87*, and execution may at all times be issued thereon by order of the insolvent court.

If the judgment is under seven years old, the *scire facias* issues of course upon a *præcipe* without rule or motion; if above seven, and under ten, a side-bar or treasury rule is obtained. If the judgment be more than ten years old, a

(*u*) See Tidd, 9th ed. 1104: 2 Smith, 66: 2 B. & C. 242: 3 D. & R. 603, S. C.: ante, 675, 699.

(*x*) Ro Abr. 899: and see *Fish v. Wiseman*, Pain 449; Latch. 193, S. C.

(*y*) *Bellasis v. Hanford*, Cro. Jac. 364: and see 1 Ro. Rep. 104, S. C.: *Dennis v. Drake*, Lane, 20: *Howard v. Pitt*, 1 Show. 402, 403.

(*z*) See ante, 675, 683, 699.

(*a*) *Simpson v. Heath*, 7 Dowl. 832, semble overruling *Brown v. Pearce*, M. T. 1833, K. B., M.S.: see the former practice, 1 H. Bl. 297: *Welden v. Greg*, 1 Sid.

59: *Aires v. Hardress*, 1 Str. 100: *Low v. Beart*, Barnes, 210: *Blayer v. Baldwin*, 2 Wils. 82: Co. Lit. 290. b.: 6 Bac. Abr., Sci. Fa. C.: R. E., 5 G. 2, r. 3 a: Vol. I. p. 396. The continuances might have been entered at any time. They are now abolished (ante, Vol. I. 200).

(*b*) *Seymour v. Greenwill*, Carth. 283: *Cooke v. Bathurst*, 2 Show. 235: Comb. 232.

(*c*) Clift. 874, 883.

(*d*) *Putland v. Newman*, 6 M. & Sel. 179.

(*e*) *Aires v. Hardress*, 1 Str. 100: 2 Saund. 68 d: Vol. I. p. 396.

scire facias to revive it cannot be issued without a motion for that purpose in term, or a judge's order in vacation, nor, if more than fifteen years, without a rule to shew cause (*h*). As to the proceedings upon this writ, and the mode of applying for leave to issue it after seven years, see *post*, 829 to 833.

It seems that a writ of error does not prevent the plaintiff from proceeding by *sci. fa.* on the judgment (*i*): and it has been expressly decided that on a *sci. fa.* to revive a judgment against an executor it is not a good plea that a writ of error is pending (*k*).

Writ of Error
no Bar to.

In cases where a *scire facias* is requisite, if execution be sued without it, such execution is, it seems, not void, but voidable only upon writ of error (*l*), or it might be set aside upon application to the court or a judge (*m*).

Consequence
of Omission.

2. Scire Facias, upon the Death of Parties.

Death after final Judgment and before Execution, 819.

Death between Verdict and Judgment, 821.

Death between interlocutory and final Judgment, 823.

Death of one of several Plaintiffs or Defendants, 824.

[*Death after final Judgment and before Execution.*] If the plaintiff die after final judgment, his executors, &c., must sue out a *scire facias* against the defendant, before they can have execution; or, if the defendant die after final judgment, a *scire facias* must be sued out against his executors, or against his heir and terretenants (*n*). But if the plaintiff die after a *feri facias* sued out, inasmuch as the sheriff derives authority from the writ, it may be executed notwithstanding, and his executor or administrator shall have the money (*o*); or if the plaintiff have made no executor, or administration be not granted, the money must be brought into court, and there be deposited, until &c. (*p*). So, if the defendant have died within a year after the judgment, we have seen (*Vol. I.* 397) that a writ of execution may be sued out against his goods in the hands of his executor, without a *scire facias*, provided such a writ of execution bear *teste* before his death (*q*). So, if he die after a *fi. fa.* sued out, but before it has been executed, there is no necessity for a *scire facias*, but the writ may be executed upon the goods in the hands of the executor, &c. (*r*). If a judgment be revived by *scire facias*, and the defendant die before execution, the plaintiff must sue out another *sci. fa.* against his executors, &c., before he can exe-

2. Scire Facias, upon the Death of Parties.

Death after Final Judgment and before Execution.

(h) R. H., 2 W. 4. r. 79, *post*, 831.

(i) *Thomas v. Williams*, 3 Dowl. 655.

(k) *Snook v. Mattock*, 5 A. & E. 239: see Tidd, 9th ed. 530: Com. Dig., Pleader (3 L. 10): *Rowley v. Raphson*, Skin. 590: *Sampson v. Brown*, 3 T. R. 643: Bac. Abr., Supersedeas (D. 5).

(l) *Patrick v. Johnson*, 3 Lev. 404: *Shirley v. Wright*, 1 Salk. 273; 2 L. Raym. 775, S. C. But, according to the recent case of *Mortimer v. Piggoth*, (2 Dowl. 615), the executions and proceedings would, in such case, be absolutely void and a mere nullity: the above cases, however, were

not cited.

(m) See *Putland v. Newman*, 6 M. & Sel. 179.

(n) *Fitz. Execution*, 243: 1 Saund. 219, e. f: 2 Saund. 6, 72 o.

(o) *Cleve v. Beer*, Cro. Car. 459: *Harrison v. Bowden*, 1 Sid. 29: *Clerk v. Withers*, 2 L. Raym. 1073; 1 Salk. 322, S. C.: Tidd, 9th ed. 1000.

(p) *Thoroughgood's case*, Noy, 73: *Clerk v. Withers*, 2 L. Raym. 1073.

(q) See 2 Bac. Abr., Execution, G. 2: 2 Williams, Exors. 1227, 1228.

(r) 6 Bac. Abr., Sci. Fa. C. 1.

BOOK III.
PART I.

cute the judgment(s). In all these cases, if any of the executors be a *feme covert*, her husband must be made a party to the *scire facias* (t). But if any of the executors be a bankrupt, he may notwithstanding proceed or be proceeded against by *scire facias*; for his bankruptcy does not affect his representative character (t). It may be added, that on a *sci. fa.* to revive judgment against an executor it is not a good plea that a writ of error is depending on the judgment (u).

By and
against whom
to be issued.

Against per-
sonal Repre-
sentative.

The *scire facias* must be brought by or against the person or persons who represent the deceased. If the plaintiff in a personal action die, the *sci. fa.* must be brought by his executor or administrator; in a real action, by his heir (x); in a mixed action, it is said, if the lands to be recovered be fee-simple, the heir and executor shall join in the *scire facias*, and the heir have execution as to the lands, and the executor execution as to the damages (y). On the death of a plaintiff the *scire facias* may be in the names of all the executors, though one only has proved the will (z). If the defendant die, the *scire facias* must be brought against his executor, or his heir and terretenants, as shall be mentioned presently.

A *sci. fa.* may be sued out by or against the executor of an executor, who has proved the will; but not by or against the administrator of an executor, or the executor or administrator of an administrator, because they do not represent the deceased (a). In these latter cases, administration *de bonis non* must be sued out, and then the administrator *de bonis non* may, by 17 C. 2, c. 8, s. 2, sue out a *scire facias*, and have execution of the judgment; or he may perfect an execution already begun (b). This statute, however, does not extend to allow an administrator *de bonis non* to proceed upon a judgment in *scire facias* (*quod habeat executionem*) already obtained by the executor in his lifetime, but he must sue out a *scire facias* to revive the original judgment (c); nor does it extend to judgments by default, but to judgments after verdict only (d). Also, if a judgment be recovered against an executor who dies intestate, it may be revived as against the administrator *de bonis non*, at common law, and execution had upon the judgment (e). If an administrator *durante minori ætate* bring an action, and recover, and the executor then come of age, the latter may have a *scire facias* upon the judgment (f).

Against Heir.

If *nil* be returned to a *scire facias* against the executor, the plaintiff may have another *sci. fa.* against the heir and terretenants, in order to have execution of any lands of which the defendant was seised at the time of the judgment, or

(s) *Hardisty v. Barry*, 2 Salk. 598.

(t) 2 Saund. 72 o.

(u) *Snook v. Mattock*, 5 A. & E. 239.

(x) 6 Bac. Abr., Sci. Fa. C. 5.

(y) 19 E. 4, 5 b: 43 E. 3, 2: Ro. Abr. 889.

(z) *Scott v. Briant*, 6 Nev. & M. 381; 2 H. & W. 54, S. C.

(a) 5 Co. 9 b.

(b) *Clerk v. Withers*, 1 Salk. 323; 2 L. Raym. 1072; 6 Mod. 290; 11 Id. 34, S. C.

(c) *Treviban v. Lawrence*, 2 L. Raym. 1049.

(d) *Clerk v. Withers*, 1 Salk. 322; 2 L.

Raym. 1072; 6 Mod. 290; 11 Id. 34, S. C.

(e) 2 Saund. 72 o: *Snape v. Norgate*, Cro. Car. 167; 1 Ro. Abr. 890, T. pl. 3: *Norgate v. Snape*, W. Jon. 214.

(f) Ro. Abr. 888: *Beamond v. Long*, Cro. Car. 227; 2 Brownl. 83; Godb. 104: *Hatton v. Mascall*, 1 Lev. 181. See forms of *scire facias* for or against an executor or administrator to revive a judgment obtained by or against the testator or intestate, Chit. Forms, 474, 476; Co. Ent. 617 a; 618 b: Lil. Ent. 638 to 659: and see *Morfoot v. Chivers*, 1 Str. 631; 2 L. Raym. 1395, S. C.

after it (*g*); but it is said that, in the case of a judgment against one defendant, since deceased, the *scire facias* will not lie against the heir and terretenants, unless *nil* have first been returned to a *sci. fa.* against the personal representatives of the deceased (*h*). It is usual to join the heir and terretenants (*i*). You may, however, sue out the writ against the heir alone, without naming the terretenants; but it seems the better opinion, that it cannot be sued out against the terretenants alone, without the heir, unless the heir have been already summoned, or it be returned that there is no heir, or that the heir has no lands; for the heir may have a release or some other matter to plead, in bar of execution (*k*). If brought against both, it is said, that if it be returned that the heir has no lands, the writ may proceed against the terretenants without him (*l*). The writ may be against the tenants either generally or by name (*m*). The former, however, is preferable; for if the plaintiff undertake to name them, and do not name them all, those named may plead that matter in abatement (*n*). After a *scire facias* against the heir and terretenants, the plaintiff previously to the 1 & 2 V. c. 110, could have had execution only of a moiety of the lands, by *elegit*, in the same manner as if the defendant were living (*o*); even although the heir may have pleaded a false plea (*p*), which, in actions against an heir on the bond of his ancestor, would have the effect of charging the defendant in the same manner as if the action were for his own debt (*q*). But by the 11th section of that statute, the effect of the *elegit* (except in certain cases already noticed, as against purchasers, mortgagees, and creditors) has been extended so as to give the plaintiff execution of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment or at any time afterwards have any disposing power which he might, without the assent of any other person, exercise for his own benefit (*r*).

and Terre-
tenants.

Death between Verdict and Judgment.] By stat. 17 C. 2, c. 8, s. 1, in all actions, personal, real, or mixed, the death of either party between verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after such verdict (*s*). This statute extends to all personal actions, notwithstanding the cause of action could not

Death be-
tween Verdict
and Judg-
ment.

(*g*) 2 Saund. 7, n. (4); 72 o, p.

(*h*) *Panton v. Terretenants of Hall*, Carth. 107; *Eyres v. Taunton*, Cro. Car. 313; 2 Salk. 598, S. C.

(*i*) F. N. B. 597 a: *Sir C. Haydon's case*, Cro. El. 896; *Eyres v. Taunton*, Cro. Car. 295; *Panton v. Terretenants of Hall*, 2 Salk. 598; Lil. Ent. 394, 395.

(*k*) 6 Bac. Abr., Sci. Fa. C. 5; 27 H. 6, 135; 1 E. 2, 242; 3 Co. 13 a; *Eyres v. Taunton*, Cro. Car. 295, 313.

(*l*) F. N. B. 597 a.

(*m*) *Proctor v. Johnson*, 2 Salk. 600; 1 L. Raym. 669, S. C.

(*n*) *Beresford v. Cole*, Comb. 282; *Adams v. Terretenants of Savage*, 1 Salk. 40;

2 Id. 679, 601; 6 Mod. 134, 199, 226, S. C. *Holland v. Lee*, 1 Ro. Rep. 57.

(*o*) 2 Saund. 7 n.

(*p*) *Bowyer v. Riritt*, W. Jon. 87, 88; *Brandlin v. Millbank*, Carth. 93; Comb. 162, S. C.

(*q*) See the forms of a *scire facias* against heir and terretenants, Chit. Forms, 477.

(*r*) 1 & 2 V. c. 110, s. 11. See *ante*, Vol. I. "Execution."

(*s*) See *Pond v. King*, 1 Wils. 124; *Copley v. Day*, 4 Taunt. 702. In *Chauvill v. Chimmelli*, 4 B. & Ad. 590; 1 Nev. & M. 731, S. C., where plaintiff's attornies gave defendant's attornies their own under-

BOOK III.
PART I.Before Assizes
or Sittings.When entered,
and
Leave to enter
it *nunc pro*
tunc.

have survived to the representatives of the deceased, as for a libel, &c. (*t*). It does not extend to a nonsuit (*u*).

The death of either party before the assizes or sittings is not remedied by this statute (*x*); but if the party die after the assizes begin (*y*), or after the first day of the sittings (*z*), though before the trial, it is within the remedy of the statute; for the assizes or sittings are but one day in law.

It is not necessary that the judgment should be actually entered upon the roll within two terms after the verdict; if it be signed within that time, it will be sufficient (*a*); and it seems even the signing of the judgment within that time will be unnecessary, if prevented by any application to the court delaying it (*b*), or by any act of the court, as in the case of a special verdict or special case (*c*). And at common law, before the rule of *H. T.*, 4 *W.* 4, *r.* 3 (*d*), (ordering the judgment to be entered of the day of the month and year when signed), if either party died after special verdict and pending the time for argument, &c., thereon, or on demurrer or motion in arrest of judgment, or for a new trial, judgment might be entered after the death as of the term in which the *postea* was returnable, or in which judgment would otherwise have been given, *nunc pro tunc* (*c*). So, in actions against executors, &c., if the motion were made within a reasonable time, the court would have given the plaintiff leave to enter up judgment as of a preceding term when it might have been signed *nunc pro tunc* (*e*). But generally the court had no power to allow judgment to be entered *nunc pro tunc*; and, at all events, they would not so allow it where the delay was wholly attributable to the laches of the party applying (*f*). The above rule of *H. T.*, 4 *W.* 4, contains a proviso empowering the court or judge to order a judgment to be entered up *nunc pro tunc*; and the court or judge may still therefore, as formerly, order the judgment to be entered up *nunc pro tunc*; but that proviso does not give them greater powers than they before had (*g*). And in a recent case, where the defendant gave a *cognovit*, and died on 15th Jan. 1837, before judgment was signed, and the plaintiff in Easter term applied to the court for leave to enter up judgment *nunc pro tunc*, alleging that he was not aware till recently that the defendant had died, or who his executors were, the court refused the application, as the plaintiff might have applied in the preceding term or vacation, and as the delay was not the act of the court, but

taking as security for costs; the defendant obtained a verdict and died, and judgment was entered up in his name within two terms: it was held, that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security to satisfy such claims without any *scire facias* having been sued out by the personal representatives.

(*t*) *Palmer v. Cohen*, 2 B. & Ald. 966.

(*u*) *Dowbiggin v. Harrison*, 10 B. & C. 480.

(*x*) *Taylor v. Harris*, 3 B. & P. 549.

(*y*) *Anon.*, 1 Salk. 8; *Plomer v. Webb*, 2 L. Raym. 1415; *Anon.*, 7 T. R. 32, n.

(*z*) *Jacobs v. Miniconi*, 7 T. R. 31. Each sittings in term is considered independent of the others. (*Johnson v. Budge*, 3 Dowl. 207; see *Johnson v. Hamilton*, 4

Dowl. 762).

(*a*) *Heie v. Baker*, 1 Sid. 385; *Webb v. Spurrell*, Barnes, 261; 2 Saund. 72 m: see *Duke of Norfolk's case*, 1 Salk. 401.

(*b*) *Bridges v. Smyth*, 8 Bing. 29; 1 M. & Scott, 93, S. C.

(*c*) *Lawrence v. Hodgson*, 1 Y. & J. 363; and the cases there cited.

(*d*) *Ante*, Vol. I. 341.

(*e*) *Mara v. Quin*, 6 T. R. 6.

(*f*) *Copley v. Day*, 4 Taunt. 702; *Rhodes v. Haigh*, 3 D. & R. 608; *Fowler v. Whadcock*, Barnes, 262; *Lawrence v. Hodgson*, 1 Y. & J. 368.

(*g*) *Lanman v. Lord Audley*, 2 M. & W. 535; *Vaughan v. Wilson*, 4 Bing. N. C. 116; 6 Dowl. 210; 5 Scott, 408, S. C.; *Doe Taylor v. Crisp*, 7 Dowl. 584; *Lambirth v. Barrington*, 2 Bing. N. C. 149.

that of the plaintiff(*h*). And where a verdict was given, subject to a special case, which was not set down for argument until after the death of the party against whom judgment was ultimately given, the court refused to allow judgment to be entered *nunc pro tunc*, at the instance of the successful party, as the delay in setting down the special case could not be considered as that of the court(*i*).

CHAP. III.
SECT. I.

The judgment is entered for or against the deceased party, as if he were living(*j*). Form of Judgment.

But although the judgment in this case is entered as if the party were alive, yet it must be revived by *scire facias* before execution can be sued out upon it(*k*). And as the *scire facias* must pursue the judgment, it must recite it as if it had been entered in the party's lifetime(*l*); that is, the *sci. fa.* must be in the form in which the writ is usually conceived, when brought by or against the personal representatives of a person who had died after judgment(*m*). Must be revived by Sci. Fa. before Execution.

Death between interlocutory and final Judgment.] If either plaintiff or defendant, in actions in courts of record, happen to die after interlocutory and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executor, &c., of the party dying; but the plaintiff, or his executors or administrators, shall have a *scire facias* against the defendant or his executors, &c., to shew cause why damages should not be assessed and recovered by him or them; and upon *scire feci* returned, or upon *nihil* returned and eight days elapsed from its return, and leave of the court or a judge obtained(*n*), and default made, or no cause shewn, a writ of inquiry shall be awarded, executed, and returned, and final judgment thereupon given(*o*). Death between interlocutory and final Judgment.

If the death happen before the writ of inquiry is executed, it must be to shew cause why the damages should not be assessed against the defendant, or his executors, &c., as the case may be(*p*). But if the death happen after the execution of a writ of inquiry, the *scire facias* must be to shew cause why the damages assessed by the jury should not be recovered; otherwise it will be quashed(*q*). Form of the Sci. Fa. in this case.

The final judgment in this case is, of course, for or against the executor, &c., and not for or against the testator himself, as upon the statute 17 C. 2, above mentioned(*r*). Form of the Judgment.

Also, in case of the death of a defendant, besides the *scire facias* here mentioned, sued out before final judgment, another *scire facias* must be sued out after final judgment, in order to give the executors an opportunity of pleading the want of assets, &c.; for it would be unreasonable that the executor Scire Facias on the final Judgment before Execution.

(*h*) *Lanman v. Lord Audley*, 2 M. & W. 535: see *Vaughan v. Wilson*, 4 Bing. N. C. 116; 6 Dowl. 210; 5 Scott, 408, S. C.

(*i*) *Doe Taylor v. Crisp*, 7 Dowl. 584.
(*j*) *Weston v. James*, 1 Salk. 42: *Colebeck v. Peck*, 2 L. Raym. 1280.

(*k*) *Earl v. Brown*, 1 Wils. 302.
(*l*) *Colebeck v. Peck*, 2 L. Raym. 1280: and see *Burnett v. Holden*, 1 Lev. 277; 2 Saund. 72 m.

(*m*) See ante, 820. See forms of the *scire facias*, &c., Chit. Forms, 487.

(*n*) R. H., 2 W. 4, r. 81, post, 833.

(*o*) 8 & 9 W. 3, c. 11, s. 6: see *Wallop*

v. Irwin, 1 Wils. 315: *Fort v. Oliver*, 1 M. & Sel. 242: *Berger v. Green*, Id. 229.

(*p*) *Smith v. Harmon*, 1 Salk. 315: *Lil. Ent.* 647. And see the form, where the death happened before the issuing of the writ of inquiry, Chit. Forms, 488; and when it happened after the issuing, and before execution of the writ, Id. Clift. 680: *Lil. Ent.* 647.

(*q*) *Goldsworthy v. Southcott*, 1 Wils. 243: *Executors of Wright v. Nutt*, 1 T. R. 388. See the form, Chit. Forms, 489.

(*r*) *Weston v. James*, 1 Salk. 42.

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should be in a worse situation when the defendant dies before final judgment, than when he dies after it(s). In a case where the defendant died intestate after interlocutory judgment, and a writ of inquest of damages executed, but before it was returned the plaintiff declared in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate; the plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderent*, entered up final judgment to have execution against the defendant as administrator according to the force, form, and effect of the *said recovery*, no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts; and it was held that the judgment was erroneous, and it was reversed with costs(t).

Death of one of several Plaintiffs or Defendants.

Death of one of several Plaintiffs or Defendants.] Where there are two or more plaintiffs or defendants, and one dies after judgment, execution by *fieri facias* or *ca. sa.* may be sued out as in other cases without any *scire facias*(u); and the execution must be in the joint names of all the plaintiffs or defendants, as the case may be, and must in other respects pursue the judgment(v); but it should be executed against the survivors only(x). If the plaintiff, however, wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter(y).

3. Scire Facias, upon the Marriage of a Feme Plaintiff or Defendant.

3. Scire Facias, upon Marriage. Of a Feme Plaintiff.

Marriage of a Feme Plaintiff.] If a *feme sole* obtain judgment, and marry before execution, a *scire facias* must be brought by husband and wife, in order to have execution of the judgment(z); and if, after execution awarded on this *scire facias*, but, before execution, the wife die, the husband alone may have execution upon the judgment, without even taking out administration(a). So, if the husband and wife obtain judgment for a debt due to the wife *dum sola*, the husband may have a *scire facias* to execute the judgment(b); or he may, it seems, sue out execution in the names of himself

(s) 2 Saund. 72, n: *Tomkins v. Gratton*, Say. 266; 2 Williams, Exors. 1232. See form of the *sci. fa.* upon the first judgment, Chit. Forms, 490; and of the *sci. fa.* on the final judgment, Id.

(t) *Poulett v. Wightman*, 1 Bligh, N. S., 133.

(u) 6 Bac. Abr., Sci. Fa. C. 4: *Withers v. Harris*, 7 Mod. 68; 2 L. Raym. 808, S. C.: *Brace v. Pennoyer*, 5 Mod. 339: *Pennoyer v. Brace*, Carth. 404: *Howard v. Pitt*, 1 Show. 402.

(v) See Vol. I. 455.

(x) *Pennoyer v. Brace*, 1 L. Raym. 244; Comb. 541; 1 Salk. 319, S. C.: see *Withers*

v. Harris, 2 L. Raym. 808; 7 Mod. 68, S. C.

(y) *Panton v. Terretenants of Hall*, Carth. 107; 2 Saund. 72 p; and see 6 Bac. Abr., Sci. Fa. C. 5; 2 Id. Execution, G. 1: see Vol. I. 444. See forms, Chit. Forms, 492.

(z) 2 Saund. 72 k. See the form, Chit. Forms, 493: Thes. Brev. 256, 265: Clift. 681.

(a) 6 Bac. Abr., Sci. Fa. C. 6: *Woodyer v. Gresham*, 1 Salk. 116; Comb. 455: Carth. 415; Skin. 682, S. C.

(b) *Eyres v. Coward*, 1 Sid. 337: *Butler v. Delt*, Cro. El. 844: *Obrian v. Ram*, 3 Mod. 158; 6 Bac. Abr., Sci. Fa. C. 6.

and wife, without a *scire facias*. Where the wife recovers a judgment while single, and dies during coverture, and the husband has not been made a party to the judgment by *scire facias* in her lifetime, it would seem that the husband must take out administration to the wife before bringing *scire facias*; and where in such a case the husband died without taking out administration, and his administrator brought *scire facias*, on demurrer, judgment was given for the defendant (*c*). And if the husband and wife have judgment for a debt due to the wife as executrix, and the wife die before execution, the succeeding executor or administrator *de bonis non*, and not the husband, shall have the *scire facias* (*d*).

Marriage of Feme Defendant.] If judgment be recovered against a *feme sole*, and she marry before execution, a *scire facias* must be brought against the husband and wife, before the judgment can be executed (*e*); and if, after execution awarded upon this *scire facias*, but before execution, the wife die, the husband shall be liable to the execution (*f*). However, in a case where a *feme sole* defendant married after interlocutory judgment, the court held that the plaintiff might proceed to final judgment and execution by *ca. sa.* against her, without suing out a *scire facias* to make the husband a party (*g*). And in a more recent case, where a *feme sole* defendant in ejectment married before trial, and the plaintiff proceeded to judgment, and sued out an *habere facias* and a *fi. fa.* against her by her maiden name, without a *scire facias*, the court held that there was no pretence for setting aside these writs on that account; for the writ of possession could not affect the husband or his property, the verdict proving that the wife had no interest in the term; and as to the *fi. fa.* it was merely inoperative, as the wife could have no separate property in the goods upon which such a writ might be executed (*h*).

Marriage of
Feme Defen-
dant.

Where a *feme covert*, sued as a *feme sole*, had judgment on a plea of coverture, and execution was sued out in the names of her and her husband, the court held it to be clearly irregular; execution should not have been sued out in the name of the husband, until he had first been made a party to the judgment by *scire facias*; but, in this case, the wife might have sued out execution in her own name, because the plaintiff, by declaring against her as a *feme sole*, was concluded from denying it (*i*).

4. Scire Facias, in case of Bankruptcy or Insolvency.

Bankruptcy, &c., of Plaintiff.] If a party obtain interlocutory judgment, and before final judgment become bankrupt, his assignees may proceed to final judgment in his name, and then sue out a *scire facias* to make themselves parties, in order to have execution (*j*); and even where execution was

4. Scire Fa-
cias on Bank-
ruptcy or In-
solvency.
Of Plaintiff.

(c) *Betts v. Kimpton*, 2 B. & Ad. 938.
(d) *Beaumont v. Long*, Cro. Car. 208,
227; *W. Jon.* 248, S. C.: 6 Bac. Abr., Sci.
Fa. C. 6.
(e) 2 Saund. 72 k. See the form, Chit.
Forms, 493; *Thes. Brev.* 247, 251.
(f) 6 Bac. Abr., Sci. Fa. C. 6: *Obrian*
v. Ram, 1 Salk. 116; *Woodyer v. Gresham*,

Id.; *Carth.* 30, 415.
(g) *Cooper v. Hunchin*, 4 East, 521.
(h) *Doe Taggart v. Butcher*, 3 M. & Sel.
557.
(i) *Wortley v. Rayner*, 2 Doug. 637.
(j) *Hewitt v. Mantell*, 2 Wils. 372. See
the form, Chit. Forms, 495.

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taken out in the name of the bankrupt, without a *scire facias* being sued out by the assignees, the court refused to set aside the proceedings (*k*). If a party have final judgment, upon which the defendant brings a writ of error, and pending the writ of error the plaintiff become bankrupt, his assignees ought to proceed to an affirmance of the judgment in the bankrupt's name, and then sue out a *scire facias* in order to have execution (*l*). The court have allowed the *sci. fa.* to be amended, even after issue joined, by inserting the name of the official assignee (*m*).

The practice, it should seem, is the same, where the plaintiff takes the benefit of an insolvent act.

Bankruptcy,
&c., of De-
fendant.

[*Bankruptcy, &c., of Defendant.*] If a party have been a bankrupt, or have taken the benefit of an insolvent act, or have compounded with his creditors, and afterwards become a bankrupt, and obtained his certificate, his person only shall be thereby protected; but his future estate and effects, (with the exception of his "tools of trade, necessary household furniture, and the wearing apparel of himself, his wife and children"), unless his estate pay 15s. in the pound under the fiat, will vest in the assignees under the first fiat, who may seize them in the same way as they may seize property possessed by the bankrupt at the issuing of the fiat (*n*). Since this enactment, therefore, the property being vested in the assignees, the judgment-creditor in these cases has not, as such creditor, any right of seizing such future effects, as he formerly had. The former practice was, that if the creditor in such a case obtained a judgment, which was signed *after* the defendant had obtained his certificate under the second commission, it might have been special against his future estate and effects, with the exception of his tools of trade, &c.; but where the judgment was had *before* the defendant had obtained his certificate, it must have been a general judgment (*o*), and the plaintiff could not thereupon sue out a special execution against the defendant's future effects (*p*), but must have proceeded by *scire facias* (*q*).

Under Lords'
Act.

By the Lords' Act (*r*), the future effects of insolvents, discharged under that act, are rendered liable to their debts, with the exception of the necessary wearing apparel and bedding of the insolvent and his family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l*. in value in the whole. If a general judgment be had against a person before his discharge under this act, a special execution cannot afterwards be sued out upon it, without first suing out a *scire facias* (*s*).

Not necessary

No *sci. fa.*, on account of lapse of time, is necessary to re-

(*k*) *Waugh v. Austen*, 3 T. R. 437; and see *Plummer v. Lea*, 5 Mod. 88; *Winter v. Kretchman*, 2 T. R. 45. There does not appear to be any sound reason for allowing this, and at the present day it would be safest to make the assignees parties to the judgment by a *scire facias*.

(*l*) *Kretchman v. Beyer*, 1 T. R. 463, 631; *Winter v. Kretchman*, 2 Id. 45; *Monk v. Morris*, 1 Mod. 93; 1 Vent. 193, S. C.; *Hewit v. Mantell*, 2 Wils. 372; *Bibbins v. Mantell*, Id. 378.

(*m*) *Holland v. Phillips*, Q. B., T. 1839; 3 Jurist, 795.

(*n*) 6 G. 4, c. 16, s. 127. See the effect of this section discussed, *Young v. Rishworth*, 3 Nev. & P. 585.

(*o*) 2 Saund. 72 g, h.

(*p*) *Burton v. Mardin*, 1 T. R. 82.

(*q*) See 2 Saund. 72 h; 1 Id. 358 n; *Gill v. Scrivens*, 7 T. R. 27; *Edmonson v. Parker*, 3 B. & P. 185; and the forms, *Tidd's Forms*, 469, 471.

(*r*) 32 G. 2, c. 32, s. 20, rendered inoperative for the future by the 1 & 2 V. c. 110.

(*s*) *Buxton v. Mardin*, 1 T. R. 82: see also *Snalton v. Moorhouse*, 6 T. R. 366; and a form, *Tidd's Forms*, 471.

vive the judgment on the warrant of attorney, executed by an insolvent before adjudication, pursuant to the 87th section of the 1 & 2 V. c. 110, (the late insolvent act), and execution may at all times issue thereon, by virtue of the order of the insolvent court.

CHAP. III.
SECT. I.
in case of
Judgment
under 1 & 2
Vict. c. 110,
s. 87.

5. Scire Facias, on a Judgment in Debt on Bond.

In debt on bond or other instrument in a penal sum, conditioned for the performance of covenants, or for the doing of any other specific act, although the judgment is entered up for the entire penalty, yet execution is sued out for the amount of such damages only as the jury assess upon the breaches assigned or suggested, as has been already mentioned (*ante*, 723, 724). The judgment, however, still remains as a security to the plaintiff for such damages as he may sustain by any further breaches; and in case of any such further breaches, the plaintiff shall have a *scire facias* upon the judgment, against the defendant, his heirs, terretenants, or executors or administrators, suggesting such other breaches, and summoning him or them to shew cause why execution should not be awarded upon the judgment, upon which there shall be the like proceeding, as was in the action of debt upon the bond for assessing damages upon trial of issues, joined upon such breaches or inquiry thereof, upon a writ to be awarded for that purpose (*t*). We have seen, *ante*, 683, that this *scire facias* is not necessary on a judgment upon a warrant of attorney; and that though it is usual to insert in such warrant a clause dispensing with the *scire facias*, it is unnecessary.

5 Scire Facias, on a Judgment on Bond.

The *scire facias* in this case should recite the whole proceedings in the former action, or at least so much of them as to make it appear that the judgment is warranted by the statute; and it must then suggest the further breaches (*u*). Or, if the plaintiff in the original action has set forth only some of the covenants, and he now wish to recover damages for breaches of others, it should seem that he may now state these latter covenants in the *scire facias*, and assign breaches on them (*x*).

Form of.

The proceedings upon this *scire facias* are the same as in the original action (*y*); but it is not necessary that there should be any other judgment than the usual one in *scire facias*, namely, an award of execution (*z*).

Proceedings on.

The plaintiff was always entitled to costs on this *scire facias*, even before the 3 & 4 W. 4, c. 42, s. 34, whether the defendant pleaded to it or not, notwithstanding sect. 3 of the 8 & 9 W. 3, c. 11, gave costs in suits upon writs of *scire facias* generally, only in cases where the plaintiff obtained an award of execution after plea pleaded or demurrer joined (*a*).

Costs on.

6. Scire Facias, on a Judgment quando &c. against an Executor.

If, on the plea of *plene administravit* in an action against an executor or administrator, or on the plea of *riens per descent*

6. On a Judgment quando

(*t*) 8 & 9 W. 3, c. 11, s. 8: see as to the further proceedings, *ante*, 723, 728: see 1 Saund. 5; 2 Id. 72 g; 187 b.
(*u*) 1 Saund. 58 e. See the form, Chit. Forms, 354.

(*x*) 2 Saund. 187 b.
(*y*) See *ante*, 728.
(*z*) 1 Saund. 58 e.
(*a*) Id.: *Brooke v. Booth*, 11 East, 587.

BOOK III.
PART I.
&c. against an
Executor.

That Defects
must be sub-
sequent to the
Judgment.

Recovery of
Part.

The Inquiry.

in an action against an heir, the plaintiff, instead of taking issue on the plea, take judgment of assets *quando acciderint*; in this case, if assets afterwards come to the hands of the executor or heir, the plaintiff must first sue out a *scire facias* against such executor or heir, before he can have execution.

As the judgment *quando acciderint* is that the plaintiff do recover his debt, to be levied of the goods, &c., of the testator, which shall *thereafter* come to the hands of the executor, &c., it is necessary that the *scire facias* should state that the assets came to the executor's hands after the judgment; otherwise it would be bad (*b*). And in debt or *scire facias* on this judgment, proof of the executor's receiving assets is always, at the trial, confined to a period subsequent to the judgment (*c*).

If upon this *scire facias* assets be found for part, the plaintiff may have judgment to recover so much immediately, and the residue of the assets *in futuro* (*d*).

As to the *scire fieri* inquiry, see *post*, Part II. Ch. V. Sect. 2.

7. Scire Facias, in other Cases.

7. Scire Fa-
cias, in other
Cases.
Against Bail.

Against
Pledges in
Replevin.

For Restitu-
tion after
Reversal in
Error.

To recover
Land extend-
ed under
Elegit.

When special bail become fixed, by the recognisance being forfeited, one of the modes of proceeding against them, we have seen, is by *scire facias* on the recognisance. See upon this subject *Vol. I.* 639 (*c*). The *scire facias* in this case is an original proceeding.

If, to the *pluries capias in withernam* in *replevin*, the sheriff return *nihil*, a *scire facias* issues against the pledges (*f*); and if no cause be shewn, another *capias in withernam* issues against the cattle of the pledges; and if *nihil* be returned to that writ, a *scire facias* issues against the sheriff himself (*g*). But this *scire facias* against the pledges and the sheriff is obsolete, it being the practice to proceed upon the replevin bond against the former, and by action on the case against the latter, for taking insufficient pledges, or no pledges, without bringing any *scire facias*.

After judgment in error, reversing the judgment of the court below, if the amount of the damages awarded by the former judgment had been previously levied, but not paid over, the plaintiff in error must now sue out a *scire facias quare restitutionem non*, suggesting the matter of fact, namely, the sum levied, &c., before he can have a writ of restitution (*h*).

Where a plaintiff in an action has execution by *elegit*, and is put into possession of the rents and profits of the defendant's lands, if the defendant tender the debt, &c., to the plaintiff, and it be refused, or if the plaintiff have been satisfied his debt from any casual profit of the land, the defendant may have a *scire facias ad rehabendam terram*; or if the plaintiff have been satisfied his debt from the extended value of the

(b) 2 Saund. 219 a: *Mara v. Quin*, 6 T. R. 1: 2 Williams on Exors. 1221. See the form, Chit. Forms.

(c) *Taylor v. Hollman*, B. N. P. 169: 2 Williams, 1221. *Quære* if the judgment might not be taken of assets *quando acciderint* after plea pleaded? and see a form to that effect in Mr. Archbold's collection of Practical Forms, 501, ed. 1825.

(d) See *Noell v. Nelson*, 1 Sid. 448: 1

Saund. 336 b.

(e) 2 Saund. 72 a, b, d. And see forms of writ. Chit. Forms, index, title "*Scire Facias*."

(f) *Ante*, 810: *Dorrington v. Edwin*, Comb. 1.

(g) *Ante*, 810: see *Trevors v. Michelborne*, Hut. 77.

(h) Vol. I. 380. See the form of it, Chit. Forms, 124.

lands, the defendant may either have this *scire facias*, or he may enter upon the land, and recover actual possession by ejectment (*i*). But, as has been already observed, (*ante*, Vol. I. 447), a preferable mode of proceeding, to either the *scire facias* or ejectment, is by summary application to the court out of which the *elegit* issued.

CHAP. III.
SECT. 1.

A *scire facias* is the only means of repealing letters patent. The *scire facias*, in this case, may be brought either on behalf of the queen, or, where the patent has been granted to the prejudice of another, by the injured party at the queen's suit. It may be sued out either in the petty-bag-office in Chancery (*k*), or in the Court of Queen's Bench (*l*).

To repeal Letters Patent.

Where an outlawry is pardoned by the queen, the defendant must sue out a *scire facias*, requiring the plaintiff to appear and prosecute his suit against him, and he must have the plaintiff summoned thereon (*m*). There are no further proceedings upon this writ.

On Pardon of Outlawry.

If a bill of exceptions be sealed by a judge, and he die, a *scire facias* lies against his executors or administrators to certify it (*n*).

To certify Bill of Exceptions.

If a sheriff, after returning to a *fi. fa.* that he has levied the debt, retain the money in his hands, a *scire facias* may be sued out to compel him to pay it over to the party (*o*). Or, if the sheriff to a *fi. fa.* return that he seized goods and sold part of them, but that the remainder were rescued, a *sci. fa.* lies against him, to have execution for the entire sum returned (*p*). But if the sheriff return merely that the goods remain in his hands for want of buyers, in such case a *scire facias* does not lie, but a *renditioni exponas* or a *distringas nuper vicecomitem*, as mentioned Vol. I. 436, 437 (*q*).

Against a Sheriff.

The writ of *scire facias quare executionem non*, in the case of a writ of error, is abolished (*r*); so is the writ of *scire facias ad audiendum errores*, except in the case of a change of parties (*s*).

On Error.

SECT. 2.

Proceedings upon a Scire Facias.

The Writ, Summons, &c., 829.
Appearance, 835.
Declaration, id.
Plea, id.
Issue, 836.
Trial, id.

Judgment, 836.
Costs, id.
Execution, 837.
Quashing Scire Facias, id.
Amendment of, id.
Second Scire Facias, id.

The Writ, Summons, &c.] A *scire facias* upon a recognisance of bail, must, in the Queen's Bench, have been always

The Writ, Summons, &c.

(i) 6 Bac. Abr., Sci. Fa. C. 2: 2 Saund. 72 u—x.

(k) 4 Inst. 88: 2 Saund. 72 q.

(l) 3 H. 4, 6, 29. See as to this *scire facias*, 2 Saund. 72 p, q: 6 Bac. Abr., Sci. Fa. C. 3: and the form, Tidd's Forms, 487.

(m) Trye, 134, 154: see *Ellis v. Pipin*, Style, 349: *Allen v. Powell*, 1 Sid. 231: and

post, Book IV. Part I. Ch. 2.

(n) 2 Inst. 438.

(o) *Smith v. Linsey*, Hut. 32: *Sly v. Finch*, Cro. Jac. 514, and 247: Godb. 276.

(p) *Sly v. Finch*, Cro. Jac. 514: 2 Saund. 243.

(q) See note (p), and 2 Saund. 71 b, c.

(r) Vol. I. p. 369.

(s) *Id.* 387.

BOOK III.
PART I.

To whom directed.

On a Recognisance.

On a Judgment.

Teste of the Writ.

Return Day of the Writ.

directed to the sheriff of Middlesex, where the record is (*t*), although the venue in the original action was laid in a different county (*u*), for recognisances in that court are not obligatory by the caption as in the Common Pleas, but by being entered of record. But on a recognisance of bail on a writ of error, if it were entered as taken at judges' chambers in Serjeant's Inn, the *scire facias* might have been sued out in London (*x*), and in the Common Pleas upon a recognisance taken in Serjeants' Inn or before a commissioner in the country and recorded at Westminster, the *scire facias* might have been brought in London, or in the county where the recognisance was taken, or in Middlesex (*y*). But now, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 80, a *scire facias* upon a recognisance taken in Serjeants' Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only; and the form of the recognisance shall not express where it was taken.

A *scire facias* founded upon a judgment must be directed to the sheriff of the county in which the venue was laid, the defendant being supposed to reside in that county (*z*), though, indeed, on a return of *nil* to the writ against the personal representatives, the plaintiff, upon a *testatum*, may have a *scire facias* against the heir and terretenants into a different county (*a*).

As regards the *teste* of a *scire facias*.—A *scire facias* on a recognisance against bail may be tested on or after the return day of the *ca. sa.* against the principal (*b*), and the *alias sci. fa.* (if issued, but which is now rarely the case) must be tested upon the return day of the *sci. fa.* if the original action were commenced by writ of *capias* or detainer (*c*); or if the action against the principal were by original, (which cannot be the case except in ejectment or replevin, and in some other actions removed from inferior courts), the *alias sci. fa.* (if issued) should be tested on the *quarto die post* of the *sci. fa.* (*d*).

A *scire facias* upon a judgment may, it seems, be tested on any day of the term in which the judgment is signed (*e*), or in any subsequent term; and the *alias*, (if issued), on the return day of the *quarto die post* of it, according to whether the original action was commenced by writ of summons, *capias*, or detainer, or by original. A *scire facias* cannot be tested in vacation, not being within sect. 12 of the Uniformity of Process Act (*f*).

As regards the return day of a *scire facias*.—A *scire facias*

(*t*) *Bond v. Isaac*, 1 Burr. 409; 2 Saund. 72 c.

(*u*) *Coxeter v. Burke*, 2 East, 461.

(*x*) *Palmer v. Byfield*, 8 Mod. 290.

(*y*) *Hall v. Winckfield*, Hob. 195; Tidd, New Pract. 591.

(*z*) *Wharton v. Musgrave*, Cro. Jac. 331; Yelv. 218; Hob. 4, S. C.

(*a*) *Eyres v. Taunton*, Cro. Car. 313; *Panton v. Terretenants of Hall*, Carth. 105.

(*b*) See *Sandland v. Claridge*, 2 Dowl. 115, 1 C. & M. 672, S. C.; *Stewart v. Smith*, 2 L. Raym. 1567; 2 Str. 866, S. C.; *Shivers v. Brooks*, 8 T. R. 628.

(*c*) See *R. E.*, 5 G. 2, r. 3 a; *Stewart v.*

Smith, 2 L. Raym. 1567; *Shivers v. Brooks*, 8 T. R. 628; *Anon.*, 2 Salk. 599; 6 Mod. 96; *Andrews v. Harper*, 8 Mod. 227.

(*d*) *Stewart v. Smith*, 2 Str. 866. It seems, the *alias sci. fa.*, if issued, although the action were commenced by original, may be tested on the return day of the first *sci. fa.*, or on any day between it and the *quarto die post* inclusive. (See *Combe v. Cuttill*, 10 Moore, 535; 3 Bing. 162, S. C.) At all events, it may be so in the Common Pleas.

(*e*) 2 Salk. 599.

(*f*) *Seaton v. Heap*, 5 Dowl. 247.

upon a judgment in an action commenced by a writ of summons, *capias*, or detainer, or upon a recognisance of bail in an action commenced by *capias* or detainer, must be made returnable on a day certain in term (*g*). If the original action were commenced by original, (as it may be, or is supposed to be, in ejectment and replevin, and in some other actions removed from inferior courts), the *scire facias* must be made returnable on a general return day in term (*g*); and in all other cases it may be returnable on a general return day (*h*). If returnable on a day certain, (as is now always the case where the original action was commenced by summons, *capias*, or detainer), and only one writ is to be sued out, it is, it seems, sufficient if there be *four days exclusive* between the *teste* and return (*i*). But if the writ *must* be returnable on a *general return* day, there must be fifteen days between the *teste* and return (*k*). If it be intended to sue out two writs, (which, as we shall presently see, is now in general unnecessary), there must be fifteen days inclusive (*l*) between the return of the second and the *teste* of the first writ (*m*); the number of days, however, between the *teste* and return of each writ is immaterial (*n*).

Care must be taken that the *scire facias* strictly pursue the terms of the judgment, recognisance, or other record, upon which it is founded. Upon a judgment against two you cannot sue out a *scire facias* against one (*o*); although upon a recognisance it is otherwise, because it is joint and several (*p*). A *scire facias* for the non-performance of a certain promise and undertaking, (in the singular number), where the judgment was upon several promises, was holden bad upon an issue of *nul tiel* record of the judgment (*q*). So where, upon a judgment of assets *quando acciderint*, a *scire facias* was sued out praying execution of assets generally, instead of such assets only as had come to the hands of the executor since the former judgment, the court held that it could not be supported (*r*).

It must pursue the Judgment, &c.

The writ must in all cases be sued out of and returnable in the court in which the record is supposed to remain (*s*).

From what Court issued.

In the case of a *scire facias* to revive a judgment, it is sometimes necessary to obtain the leave of the court, or a judge, to sue it out. At any time before *seven* years from the date of the judgment, it may be sued out as a matter of course; after seven years, and under *ten*, there must be a side-bar or treasury rule, obtained from one of the masters; and by *R. H.*, 2 *W.* 4, r. 79, "a *scire facias* to revive a judgment *more than ten years old* shall not be allowed without a motion for that purpose in term, or a judge's order in vacation; nor, if more than *fifteen*, without a rule to shew cause." The judge will grant an order without a summons in cases

Leave of Court, when necessary, and how obtained.

(*g*) See *R. E.*, 5 *G.* 2, r. 3 a: *Eden v. Wills*, 2 *L. Raym.* 1417; 2 *Str.* 694, *S. C.* 10 *Moore*, 535.

(*h*) *R. E.*, 5 *G.* 2, r. 3 a.

(*i*) *Bell v. Jackson*, 4 *T. R.* 663.

(*k*) *R. E.*, 5 *G.* 2, r. 3 a: *T.*, 8 *W.* 3, r.

1 a. (*l*) *Hicks v. Jones*, 2 *Str.* 765: *Goodwin v. Peck*, 2 *Salk.* 599.

(*m*) *R. T.*, 8 *W.* 3, r. 1 a: *E.*, 5 *G.* 2, r. 3 a: *Goodwin v. Beakbean*, *Carth.* 468; 12 *Mod.* 215, *S. C.*: *Anon.*, 7 *Mod.* 40: *Levingston v. Stoner*, *T. Jon.* 228, 221: *Algeon*

v. Byston, *Cro. El.* 738: *Combe v. Cuttill*, 10 *Moore*, 535.

(*n*) *Elliott v. Smith*, 2 *Str.* 1139.

(*o*) *Panton v. Hall*, 2 *Salk.* 598.

(*p*) 2 *Inst.* 395: and see 2 *Ro. Abr.* 468: 2 *Saund.* 72 b, c: *Sainsbury v. Pringle*, 10 *B. & C.* 751.

(*q*) *Bayes v. Forrest*, 2 *Str.* 893.

(*r*) *Mara v. Quin*, 6 *T. R.* 1.

(*s*) See *Guillam v. Hardisty*, 3 *Salk.* 320; 1 *L. Raym.* 216, *S. C.*: 2 *Saund.* 72 n.

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PART I.

where the judgment is more than ten years and under fifteen years old. After fifteen years, a judge at chambers will not interfere. The affidavit in support of the application should state the existence of the debt, and that the judgment remains unsatisfied, and that the defendant is living (or as the case may be)(*u*). The affidavit, if not made by the plaintiff, should be made by the person who was his attorney when the judgment was obtained(*x*). The validity of the judgment cannot be impeached for the purpose of opposing the motion for the *scire facias*; but a separate application must be made to set aside the judgment(*y*). On a *scire facias* against executors(*y*), the rule should be served on each who has proved the will. Where a rule is served by leaving a copy with a servant, inquiry should be subsequently made of the servant whether the master has received the copy(*z*). It may be here observed, that *scire facias* on a recognisance, or to revive a judgment, cannot be sued out after twenty years(*a*).

How sued out.

In order to sue out the writ, if the proceedings in the original action were by summons, *capias*, or detainer, *make out a præcipe for the writ(b)*, and the writ, and take them to one of the masters, who will sign the writ; get it sealed. The *alias* (if issued, but which, as we shall presently see, is now rarely the case) is *sued out in the same manner*. If the proceedings in the original action were by original, *prepare your præcipe for the writ, and take it to one of the masters, who will make out the writ; get it sealed. Or, if expedition be required, you may engross the writ on a plain piece of parchment, and get it signed by one of the masters, and sealed.*

When left at Sheriff's Office.

Having thus sued out the writ, *take it to and leave it at the sheriff's office, at least four clear searching days before the return of it, exclusive of the day of leaving it at the office, and of the day on which it is returnable(c)*. The four days need not be in term time(*d*). Sunday, or any other day on which search could not be made at the sheriff's office, must not be reckoned as one of the four days(*e*). Whit-Monday, Tuesday, and Wednesday, may be reckoned among the four days, the sheriff's office being open on those days for the purpose of searching for writs of *scire facias* in the same manner as all other days in the year(*f*). The sheriff must indorse on every *scire facias* the day of the month on which it was left with him(*g*). If there is an objection to the proceedings in *sci. fa.*, on the ground that the writ had not lain a sufficient number of days in the office, the defendant should not apply to set aside the writ itself, but only the proceedings thereon(*h*).

Necessary, in

The next step to be taken is, if possible, *to give the defend-*

(*u*) *Hardisty v. Barny*, 2 Salk. 598; *Lowe v. Robins*, 1 B. & B. 381; 3 Moore, 757, S. C.; Tidd, 9th ed. 1105; 2 Sell. Pr. 196. See the forms of affidavit and rule, Chit. Forms, 457, 458.

(*x*) *Duke of Norfolk v. Leicester*, 1 M. & W. 204; 4 Dowl. 746; 1 T. & G. 249, S. C.

(*y*) *Thomas v. Williams*, 3 Dowl. 654.

(*z*) *Panter v. Seaman*, 5 Nev. & M. 679.

(*a*) *Ante*, 815.

(*b*) See the forms, Chit. Forms, 458.

(*c*) *R. E.*, 5 G. 2, r. 3; *Forty v. Hermer*,

4 T. R. 583; *Miller v. Yerraway*, 3 Burr. 1723; *Anon.*, 1 Dowl. 142; *Fraser v. Miller*, Id. 141; *Furnell v. Smith*, 7 B. & C. 693; *Goodwin v. Lugar*, 6 M. & Sel. 133; 2 Chit. Rep. 192, S. C.; *Scott v. Larkin*, 7 Bing. 109; 4 Moo. & P. 748; 5 Dowl. 202, S. C.

(*d*) *Sandland v. Claridge*, 1 C. & M. 672.

(*e*) *Supra*, n. (*c*).

(*f*) *Armitage v. Rigbye*, 5 A. & E. 81.

(*g*) *R. E.*, 5 G. 2, r. 3.

(*h*) *Williams v. Brown*, 2 Dowl. 749.

general, to
summon or
give Notice to
Defendant.

Leave to sign
Judgment
without sum-
moning.

Defendant,
how Sum-
moned.

Notice, when
Defendant

ant notice of the *scire facias*, by summons, if he reside in the county into which the *sci. fa.* issues, or by notice, if he reside elsewhere. Formerly, it was the constant practice, where you did not intend to summon the defendant, or, in other words, to let him know of the *scire facias* having been sued out, or where you could not summon him, to have issued a writ of *scire facias*; and, having procured the sheriff's return of *nil*, you sued out an *alias scire facias*, and procured the sheriff's return of *nil* to that writ also, upon which return you might, if the defendant did not appear, have obtained a judgment against him, two *nils* being deemed equivalent to a *scire feci* or garnishment(*i*). Now, however, by rule of *H. T.*, 2 *W.* 4, r. 81, "no judgment shall be signed for non-appearance to a *scire facias* without leave of the court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave, after eight days from the return of one *scire facias*." This rule applies to proceedings by *scire facias* against the defendant to revive the judgment, as well as against bail on their recognisance(*k*). The object of this rule is to make it in general the plaintiff's duty to give notice of the *scire facias* to the defendant as above mentioned, either by summons, if the defendant reside in the county into which the *scire facias* issues, or by notice, if he reside elsewhere; and if neither of these things can be done, the plaintiff must shew by affidavit that he has attempted to summon the defendant or give him notice, and shew what endeavours he has made for that purpose(*l*). Where several attempts had been made to summon a defendant on a *scire facias*, returnable on the 28th day of *April*, and eight days had elapsed after the return of the writ, an application, on the 5th of November, to sign judgment, was holden to be too late, without summoning the defendant again(*m*). Under particular circumstances, as of the defendant's being about to abscond, &c., this may be dispensed with; and where the defendant was out of the country, but notice had been given at his last place of abode, and several efforts made to serve him without effect, the court granted a rule for judgment against him(*n*).

Where the defendant can be summoned—Get a warrant on the writ of *sci. fa.* from the sheriff's office, and give the warrant to an officer, who will thereupon summon the defendant(*o*). It may be served upon the defendant at any time before the return of the *scire facias*; or even upon the return day, provided it be before the rising of the court(*p*).

Where the defendant cannot be summoned by reason of his residing out of the county into which the *scire facias* issues,

(i) *Randall v. Wale*, Yelv. 88; *Bromley v. Littleton*, Id. 112; *Clarke v. Bradshaw*, 1 East, 89.

(k) *Jackson v. Elam*, 1 Dowl. 515.

(l) See *Jackson v. Elam*, 1 Dowl. 515; *Sabine v. Field*, 1 C. & M. 466; 1 Tyr. 388, S. C.; and the cases as to bail, ante, Vol. I. 639, 640.

(m) *Wood v. Moseley*, 1 Dowl. 513.

(n) *Bartrim v. Solyman*, 7 Leg. Obs. 236; *Weatherhead v. Landless*, 3 Scott, 406; 5 Dowl. 189, S. C.; and see *Armitage v. Rigbye*, 5 A. & E. 76.

(o) See form of warrant. Chit. Forms, 462; and of summons. Chit. Forms, 462.

(p) *Clarke v. Bradshaw*, 1 East, 86; recognised in *Lewis v. Pyne*, 1 C. & M. 771; 2 Dowl. 133, S. C.; *Webb v. Harvey*, 2 T. R. 757; *Obrian v. Frazier*, 1 Str. 644; see *Wright v. Page*, 2 W. Bl. 837; *Barr v. Satchwell*, 2 Str. 813. In a late case, the court held the sheriff liable to an action for damages, for not summoning a party, when he might have done so. (MS. 1831).

BOOK III.
PART I.cannot be
Summoned.

or otherwise—*Prepare a notice (q), stating the issuing of the scire facias, and when it was left at the sheriff's office, and the purpose for which it was left. Serre it, or use your best endeavours to serve it, and, generally speaking, as long a time as possible before the return day.*

Judgment for
Non-appear-
ance.} *scilicet*

Judgment for Non-appearance.] Call at the sheriff's office at the return of the writ for the return, and if the sheriff have returned *scire feci (r)*, then, on or after the return day, if the original proceedings were by summons, *capias*, or detainer, or the *quarto die post*, if they were by original (*s*), make out a memorandum for a rule to appear upon plain paper (*t*), and enter it with the master. This is a four-day rule (*u*); and if at the expiration of it no appearance has been made or entered, then enter the proceedings upon a roll (*x*); take it to one of the masters, who will sign judgment; then file the scire facias and return with the masters, and sue out execution.

Where De-
fendant has
not been
Summoned.

Or, if the defendant has not been summoned, call at the sheriff's office for the writ on or after the return day, and get the writ and the sheriff's return of nihil (*y*). Make out a memorandum for a rule to appear on plain paper, and enter it with one of the masters. This is a four-day rule (*z*). If no appearance has been made or entered in eight days from the return day, prepare an affidavit (*a*) of the issuing of the scire facias and the sheriff's return thereto, and of the service of the notice on defendant, or of the due endeavours to serve it (*b*). At the expiration of the eight days after the return of the writ, or in a reasonable (*c*) time afterwards, move the court or apply to a judge on this affidavit for leave to sign judgment, and the court will grant the rule, or the judge will grant his order for the rule for judgment accordingly. No summons for the judge's order is requisite or usual. The rule is absolute in the first instance. Then enter the proceedings upon a roll (*d*). Take the judge's order or rule of court to one of the masters, who will sign judgment. Then file the scire facias and return with one of the masters, and sue out execution (*e*). If the defendant was not summoned, it seems that he may, notwithstanding judgment against him, still have advantage of any matter he might have pleaded to the scire facias, either on an *audita querelâ (f)*, or by motion to the court (*g*), or even by application to a judge at chambers in vacation. When a judge's order has been made, empowering the plaintiff to sign judgment on the scire facias, on an application for a rule to set aside the judgment, the court will not inquire into the sufficiency of the notice, or whether the bail or party against whom the scire facias is issued have or have

(q) See the form, Chit. Forms, 463.

(r) Id. 463.

(s) *Sharp v. Clark*, 13 East, 391.

(t) See the form, Chit. Forms, 277.

(u) See *Wathen v. Beaumont*, 11 East, 272.

(x) See the form, Chit. Forms, 465.

(y) Id. 463.

(z) See *Wathen v. Beaumont*, 11 East, 272.

(a) See form, Chit. Forms, 464.

(b) See *Wimatt v. Cook*, 2 Dowl. 173.(c) *Wood v. Moseley*, 1 Dowl. 513.

(d) See form, Chit. Forms, 465.

(e) See the former mode of proceeding by two writs of scire facias, where you did not intend that the defendant should be summoned.

(f) *Lampton v. Collingwood*, 1 Salk. 62; 1 L. Raym. 27, S. C.(g) *Ludlow v. Lennard*, 2 L. Raym. 1295; *Anon.*, 1 Salk. 93; see *Dodd v. Beckman*, 1 L. Raym. 445; *Wharton v. Richardson*, 2 Str. 1075; *Holt v. Frank*, 1 M. & Sel. 199.

not been summoned: if the bail or party against whom the *scire facias* is issued intend to avail themselves of any objection on such grounds, they should apply to set aside the judge's order (*h*). Such order, therefore, if acquiesced in, is conclusive to the sufficiency of the notice or summons (*i*).

Upon a *scire facias* to have execution of a judgment against two, if one be returned summoned, and *nihil* be returned as to the other, or that he is dead, and the one summoned make default, the plaintiff may have judgment against the party summoned for the entirety (*k*). Against one of several.

Appearance.] Let the defendant's attorney give a written notice to the attorney or agent of the plaintiff, that he appears for the defendant. This will be now sufficient in all cases in proceeding by *scire facias*, and no appearance is filed (*l*). Appearance.

Declaration.] As soon as the defendant has appeared, you may declare against him. *Engross your declaration on plain paper, indorse upon it the notice to plead, and deliver it to the defendant's attorney or agent (m).* It should seem, that the 2 *W.* 4, c. 39, and the rules of *M. T.*, 3 *W.* 4, which were framed to meet the enactments of that statute, apply to proceedings upon writs of *scire facias* when the *scire facias* is a continuation of a suit within those enactments and rules (*n*): but that they do not apply to proceedings upon other writs of *scire facias*, and consequently in the latter case the rules as to declaring and giving the notice to plead, which existed before that statute and rules, must be still regarded. In the latter case the declaration should be intitled of the term in which the writ of *scire facias* was returnable, or of the term of which defendant appeared; and the rules as to the time for pleading, and as to when the defendant will be entitled to an imparlance, are, perhaps, the same as those noticed *ante*, 802, in a replevin suit. Declaration.

Where there are two defendants, it seems that the plaintiff cannot declare in *sci. fa.* against either until both are before the court (*o*).

Plea.] As soon as you have declared, rule the defendant to plead, and demand a plea, in the same manner as in ordinary cases (*p*), excepting that, in *scire facias* against bail, Sunday or a *dies non* is not reckoned as one of the four days given by the rule to plead, even when it is not the last day of the four (*q*). It should seem, as just observed, that the enactments of the 2 *W.* 4, c. 39, s. 11, as to pleading between the 10th August and 24th October, and the rule of *M. T.*, 3 *W.* 4, r. 12, framed to meet it (*r*), apply to proceedings in *scire facias* when the *scire facias* is a continuation of a suit within Plea.

(*h*) *Ladbrook v. Hewitt*, 1 Dowl. 489.

(*i*) See Bagley's Pract. 325.

(*k*) 1 Ro. Abr. 890, S. pl. 1, 2.

(*l*) R. H., 2 *W.* 4, r. 82. See forms of notice, Chit. Forms, 463. By that rule, "a notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias*."

(*m*) See forms of declaration, Chit. Forms, 468, 469: and see 2 Saund. 72 t:

Ward v. Gansell, 3 Wils. 154: and of notice to plead, Chit. Forms, 471.

(*n*) *Ante*, 816.

(*o*) *Panton v. Hall*, 2 Salk. 598: *Sainsbury v. Pringle*, 10 B. & C. 751.

(*p*) See Chit. Forms, 471.

(*q*) *Wathen v. Beaumont*, 11 East, 271: *Anon.*, 1 Dowl. 142: *Fraser v. Müller*, Id. 141.

(*r*) *Ante*, Vol. I. 153.

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PART I.

that statute and rule, otherwise not; and they do not apply to proceedings in *scire facias* when it is an *original* proceeding (s). *Engross your plea on plain paper, and deliver it to the plaintiff's attorney or agent (t)*. If the defendant have been summoned, and he neglect to appear and plead, he is for ever after barred from availing himself of any matter which he might have pleaded (u); although, if not summoned, we have seen that he would be relieved either by *audita querelâ*, or upon motion (x).

Issue. *Issue.*] The issue is in all cases made up by the attorney (y). If it be an issue of fact, indorse on it the notice of trial, as in ordinary cases.

Trial. *Trial.*] Proceed to trial as in ordinary cases (z). The jury find the affirmative or negative of the issue; but they cannot give damages for the delay of execution (a). The plaintiff may be nonsuit, as in other cases (b).

Judgment. *Judgment.*] *Get the Nisi Prius record from the associate, and indorse the postea upon it, if it be not already indorsed by the associate (c), and sign judgment and proceed to execution as in ordinary cases (d)*.

Costs. *Costs.*] Before the recent act, 3 & 4 W. 4, c. 42, the plaintiff was not entitled to costs on a *scire facias*, until after plea pleaded (e). But now by the 34th section of that act, "in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined." By the 8 & 9 W. 3, c. 11, s. 3, if the plaintiff be nonsuit, or discontinue, or if a verdict pass against him, the defendant shall be entitled to costs. Also, by the R. H., 2 W. 4, r. 78, "a plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs" (f). The above statutes do not, it seems, extend to a *scire facias* to repeal letters patent (g). If costs be given where they should not, the judgment may be reversed as to that, and affirmed as to the residue (h). Where a *sci. fa.* was unnecessarily sued out, but the defendant's attorney on his behalf proposed terms of compromise which were for a time acted on, *Patteson, J.*, held that the defendant could not afterwards object to the proceedings or to payment of the costs (i).

(s) *Ante*, 815.

(t) R. H., 4 W. 4, r. 1, *ante*, Vol. I. 170. See as to pleas in *scire facias*, 6 Bac. Abr., Sci. Fa. E.: 2 Saund 72 t, u, 12, n. (19); 6, 7 a; 9 a, b, 10, 11: and forms of pleas and replications, Chit. Forms, 472, 485.

(u) *Cooke v. Berry*, 1 Wils. 98.

(z) *Ante*, 834. See form of entry of judgment by default, Chit. Forms, 471; and of execution thereon, *Id.* 472.

(y) R. T., 12 W. 3 a: R. H., 4 W. 4, r. 5, *ante*, Vol. I. 203. See as to the form, Chit. Forms, 473, 485.

(z) See Chit. Forms, 473, 485.

(a) *Henriques v. Dutch East India Company*, 2 L. Raym. 1532; 2 Str. 807, S. C.:

Knox v. Costello, 3 Burr. 1791. The 3 & 4 W. 4, c. 42, ss. 28, 29, 30, do not apply to proceedings by *scire facias*.

(b) *O'Mealy v. Wilson*, 1 Camp. 484.

(c) See as to the forms, Chit. Forms, 544: 9 Went. 552.

(d) See Vol. I. 330, &c. See as to the form of entry of judgment on roll, Chit. Forms, 473, &c.

(e) *Pocklington v. Peck*, 1 Str. 638: Saund. 72 u: 8 & 9 W. 3, c. 11, s. 3.

(f) See 1 B. & Ald. 486: *Tidd*, New Pract. 595.

(g) *R. v. Miles*, 7 T. R. 367.

(h) *Bellew v. Aylmer*, 1 Str. 188.

(i) *Brewster v. Meaks*, 2 Dowl. 612.

Execution.] The execution is the same, and nearly in the same form, as in ordinary cases(*l*). In the case of a *scire facias* to revive a judgment, the writ of execution must be founded on the judgment in the *scire facias*, even in cases where the *scire facias* may have been unnecessary(*m*). And the same, of course, in all other cases. As to execution against bail on a *scire facias*, see *Vol. I.* 639, (*n*); and as to the manner in which the execution must pursue the judgment, see *Vol. I.* 400, 401, 402. Upon a *scire facias* against bail, you may have one writ of execution against both, or separate writs against each; for the recognisance is joint and several(*o*).

Quashing Scire Facias.] If there be any irregularity in the *scire facias*, the party who sued it out may apply to have it quashed, and the application will be granted on payment of costs of the proceedings on the *sci. fa.* only(*p*.) The Court of Queen's Bench will not, after appearance, make a rule for this purpose absolute in the first instance(*q*).

Amendment of.] As to the amendment of a *scire facias*, see *Amendment of.* *post*, *Book IV. Part I. Chap.* 28.

Second Scire Facias.] After reviving a judgment by *scire facias*, if a year and a day pass before execution, the judgment must be again revived by *scire facias*, before the execution can be sued out(*r*). And the same in the cases of death, marriage, &c.; after *scire facias* sued out, the judgment must be again revived before execution(*s*).

(*l*) See the 8 & 9 W. 3, c. 11, s. 3. See form of *fi. fa.* or *ca. sa.* after *scire facias* to revive a judgment, *Chit. Forms*, 481; the like for executor or administrator, on judgment obtained by plaintiff deceased, *Id.* 487; of *fi. fa.* against executor or administrator, on judgment obtained against defendant deceased, *Id.* 487; of execution for or against executor or administrator, where plaintiff or defendant died between interlocutory and final judgment, *Id.* 488.

(*m*) *Davis v. Norton*, 1 Bing. 133.

(*n*) See form of *fi. fa.* or *ca. sa.*, *Chit.*

Forms, 466.

(*o*) 1 Ro. Abr. 888: see *Sainsbury v. Pringle*, 10 B. & C. 751: *ante*, 831.

(*p*) R. H., 2 W. 4, r. 78: *Oliverson v. Latour*, 7 Dowl. 605: see *Pickman v. Robson*, 1 B. & A. 486.

(*q*) *Ades v. Stubbs*, 4 Dowl. 282; 1 H. & W. 520, S. C.: *Oliverson v. Latour*, 7 Dowl. 605.

(*r*) 2 Sellon, 189. See the form, *Chit. Forms*, 461.

(*s*) *Hardisty v. Baring*, 2 Salk. 598: 2 Sellon, 196.

BOOK III.

PART II.

PROCEEDINGS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

CHAPTER I.

PROCEEDINGS AGAINST PEERS AND MEMBERS OF PARLIAMENT.

SECT. 1. *Proceedings against, in ordinary Cases*—838, 839.

2. *Proceedings against Members subject to the Bankrupt Laws*—839, 840.

SECT. 1.

Proceedings against, in ordinary Cases.

BOOK III.
PART II.

Peers, &c.,
privileged
from Arrest.

The Process
against.

PEERS, peeresses, and members of the House of Commons, we have seen, cannot be holden to bail^(a); nor can they be taken in execution on a *capias ad satisfaciendum* ^(b). Consequently, if they be sued, they must not be held to bail; and judgment against them must be executed by *fieri facias* or *elegit*. An unprivileged person in custody in execution, who becomes a peer or member of parliament, is entitled to his discharge on motion^(c).

The process to enforce the appearance in a personal action of a person entitled to privilege of peerage or of parliament, is the same as in ordinary cases (which has been already fully noticed, *ante*, Vol. I. Book I. Part II. Chap. 1, 2). There seems no occasion to state in the process that the defendant is entitled to privilege of peerage or of parliament^(d). It is to be re-

(a) Vol. I. p. 164.

(b) Vol. I. p. 449.

(c) *Phillips v. Wellesley*, 1 Dowl. 9:
Ex p. Burton, Id. 14.

(d) It is no ground for plea in abate-

ment, that a defendant sued as a peer is also described as having privilege of parliament. (*Cantwell v. Earl Stirling*, 1 M. & Scott, 297; 8 Bing. 174, S. C.)

membered, however, that he is to be still privileged from being holden to bail(e).

The remaining proceedings in the cause, are the same as are already stated, *Vol. I.* 134 to 460, excepting that the execution must be by *fiery facias* or *elegit*, and not by *ca. sa.* A doubt formerly existed, whether, if a person were taken in execution, and set at liberty by privilege of either house of parliament, the party at whose suit such execution was pursued was for ever barred and disabled from suing forth a new writ of execution; but by 2 *Jac.* 1, c. 13, s. 2, the plaintiff may sue forth and execute a new writ of execution, as if the former execution had not taken place(f).

As to when an attachment will be granted against a peer, or member of the House of Commons, see *post*, *Book IV.* *Part III.* title "*Attachment.*"

SECT. 2.

Proceedings against Members of Parliament subject to the Bankrupt Laws.

By stat. 6 *Ge.* 4, c. 16, ss. 9 & 10, if any creditor or creditors of a trader having privilege of parliament, to such amount as is declared requisite to support a commission, shall file an affidavit or affidavits in any court of record at Westminster, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same court a [summons (2 *W.* 4, c. 39, s. 9)(g)], against such trader, and serve him with a copy of such summons—if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same(h); and, within one calendar month next after personal service of such summons, cause an appearance or appearances to be entered to such action or actions in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases thereby made felony(i).

Mode of compelling Appearance, and Security for Debt and Costs.

(e) *Ante*, Vol. I. 464, 465.

(f) See *Phillips v. Wellesley*, 1 Dowl. 9: *Ex p. Burton*, Id. 14.

(g) And see the form prescribed by the act, Chit. Forms, 496.

(h) *Hunter v. Campbell*, 3 B. & Ald.

273; 1 Chit. Rep. 731, S. C.: *Jameson v. Campbell*, 5 B. & Ald. 250; 1 Bing. 320, S. C., in error.

(i) See Arch. Bkt. L. 299; and see as to the form of the affidavit, Chit. Forms, 496.

BOOK III.
PART II.The Process
against.

It is optional, of course, with the plaintiff in this case to adopt the remedy here given, or to proceed as directed in the first Section of this Chapter.

The 2 *W.* 4, c. 39, s. 9, in the schedule No. 6, prescribes the form of this summons. It is issued and indorsed in the same manner as the ordinary writ. Where, in proceeding against a member of parliament, it appeared that the action was brought in 1823, against the defendant, who was then a member, but had since ceased to be so; the action was commenced by *bill*, and writ of *summons* thereon, and the writ was returned *non est inventus*, and entered of record, but no further steps had afterwards been taken, as the defendant had been taken out of the country; and the plaintiff being desirous of continuing the proceedings in order to save the Statute of Limitations, the court held that a writ of *distringas* ought to issue, and would be the proper continuance of the suit (*k*).

(*k*) *Taylor v. Duncombe*, 2 Dowl. 401: & R. 241; 4 Tyr. 450, S. C. and see *Dickenson v. Teague*, 1 C., M.

CHAPTER II.

PROCEEDINGS BY AND AGAINST CORPORATIONS AND
HUNDREDORS.

SECT. 1.

*Proceedings by and against Corporations.*CHAP. II.
SECT. 1.

CORPORATIONS aggregate (to which alone this section has reference) cannot sue or defend otherwise than by attorney, which attorney must be appointed under their common seal (*a*). Must sue, or defend by attorney.

In actions *by* corporations, they may hold to bail and proceed in the same manner as individuals (*b*). Even in ejectment they may now proceed in the ordinary way, without executing a power of attorney authorizing a third person to enter and make a lease on the land, as used to be the practice (*c*). They cannot, however, sue as a common informer (*d*). It may be as well observed, that a corporation may be plaintiffs in *assumpsit*, at least upon an *executed* consideration, as for use and occupation, where the tenant has held the premises under them and paid rent (*e*); and it has been held that the London Gas Company might sue in *assumpsit* for gas supplied, although there was no contract by deed under their seal (*f*); and in a late case, it was held, that a trading corporation might sue in *assumpsit* on an *executory* contract for the supply of goods for the manufacture of which the company was incorporated (*g*). A corporation must be described in all legal proceedings by their corporate name (*h*). Frequently, acts of parliament enable corporate or incorporate bodies to sue, and others to sue them, in the names of their clerks, treasurers, &c., for the time being. Proceedings by.

Proceedings *against* corporations aggregate must, formerly, have been by original, summons, or attachment, and *distringas*; and the mode of proceeding was the same as it formerly was in actions against peers, excepting that the plaintiff was not authorized by any statute to enter an appearance for the defendants, but he must have proceeded to compel an appear- Proceedings against.

(a) Co. Lit. 66. b. : Vol. I. 49.

(b) See Chit. Forms, 498.

(c) Run. Eject. 150 : Ros. 325.

(d) *Weavers' Company v. Forrest*, 2 Str. 1241.(e) *Barber Surgeons of London v. Pelson*, 2 Lev. 252 : *Dean of Rochester v. Pierce*, 1 Camp. 466 : *Mayor of Stafford v. Till*, 12

Moore, 260 ; 4 Bing. 75, S. C.

(f) *London Gas Light Company v. Nicholls*, 2 C. & P. 365 : see also *London Water Works Company v. Bailey*, 4 Bing. 283 ; 12 Moore, 532, S. C.(g) *Church v. Imperial Gas Light and Coke Company*, 3 Nev. & P. 35.

(h) 1 Leach, 4th ed., 253.

BOOK III.
PART II.

ance by levying on the lands and goods which constitute the common stock of the corporation issues on successive writs of *distringas*, moving to increase them, and from time to time to sell them, as directed *ante*, 797, 798. Now, however, by the 2 W. 4, c. 39, ss. 21, 1, 3, the process against corporations aggregate, to enforce their appearance in a personal action, is the same as in ordinary cases, by writ of summonses, or summonses and *distringas*. The corporate name must be inserted accurately in the writ. The service of the writ may be "on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary, of such corporation" (*k*). The corporation or any members of it cannot be holden to bail (*l*). It was formerly thought that *assumpsit* could not be supported against a corporation, which cannot, in general, contract by parol (*m*), except in the case of bills or notes, where the power of drawing and accepting them is recognised by statute; and other contracts sanctioned by particular legislative enactments (*n*). But it has been lately decided that *assumpsit* is maintainable against a corporation aggregate (even without a head) on an executed parol contract (*o*). And *indebitatus* in debt lies against a corporation (*p*). Trover is sustainable against them, so is case for a false return (*q*). They are also liable in tort for the wrongful act of their agent, and this though the agent be not appointed by seal, if such act be an ordinary service (*r*). A corporation aggregate, not being capable of a personal appearance, can only appear by attorney regularly appointed under their common seal (*s*). The remaining proceedings are the same as in ordinary cases.

SECT. 2.

*Proceedings against Hundredors under the 7 & 8 G. 4, c. 71.*Liability of
Hundredors.

THE statute now in force, by which hundredors are liable for damages done by rioters, is the 7 & 8 G. 4, c. 31. The statute 7 & 8 G. 4, c. 27, repeals all the prior statutes relative to such liability. Hundredors are now no longer, as formerly, liable in cases of robbery, arson, killing or maiming cattle, cutting down or destroying trees, destroying turnpikes, or works on navigable rivers, cutting hop bines, destroying corn to prevent it from being exported, destroying corn going to market, or injuring horses or carriages so conveying it, and wounding revenue officers; and hundredors, in short, are now only liable for

(*k*) 2 W. 4, c. 39, s. 13.(*l*) Vol. I. 473.(*m*) 1 Rol. Rep. 82: *London Water Works Company v. Bailey*, 4 Bing. 283; 12 Moore, 532: *Mayor of Stafford v. Till*, 4 Bing. 77; 12 Moore, 260, S. C.(*n*) *Murray v. East India Company*, 5 B. & Ald. 204: *Broughton v. Company of Manchester Water Works*, 3 B. & Ald. 1. 6 Vin. Ab. 317.(*o*) *Beverley v. Lincoln Gas & Co. Company*, 2 Nev. & P. 283; 6 A. & Ellis, 829, S. C.: and see *Clarke v. Imperial Gas & Co. Com-**pany*, 3 Nev. & P. 35: *Gibson v. East India Company*, 5 Bing. N. C. 262.(*p*) *De Grave v. The Mayor &c.*, 4 C. & P. 111: and see *Tilson v. Warwick Gas Company*, 4 B. & C. 962.(*q*) *Yarborough v. Bank of England*, 16 East. 6.(*r*) *Smith v. Birmingham and Staffordshire Gas Company*, 1 A. & E. 526; 3 Nev. & M. 771, S. C.(*s*) Bro. Abr., tit. Corp. 28: Co. Lit. 66. a. b.: 10 Co. 30 b.

damage done by rioters acting *feloniously*(*t*). The proceedings which must be taken previous to the action, and those in the action itself, will now be considered in the following Sections.

Proceedings before Action brought.] Previously to the commencement of the action, there are, by the 3rd section of the above act, certain acts required of the party injured, such as that he, or his servant having the care of the property injured, shall, within *seven* days after the commission of the offence, go before some near resident(*u*) justice, and state on his oath the names of the offenders, and submit to an examination, and enter into a recognisance to prosecute. The examination of the party must take place within seven days exclusively of the day on which the offence was committed(*x*).

Proceedings
before Action
brought.

All the persons damnified, who have any knowledge of the circumstances of the offence, or all the servants who had the care of the property damaged, and have any knowledge of such circumstances, should go before the justice to be examined(*y*). It is not *necessary* that both the person injured and servant be examined(*z*); if the former has no knowledge of the circumstances of the offence, being such a knowledge as is available in evidence, then the servant or servants who had the care of the property should be examined(*a*). Where the reversioner sued on the Black Act, his own oath was held sufficient, without examining the tenant or his servant(*b*). The party is not, it seems, in his examination bound to state his *suspicion* respecting the offender(*b*). It has been held that the swearing before a justice to a deposition *previously* prepared, is a sufficient submission to examination within the meaning of the act, if the justice require nothing further(*c*). The examinations need not be taken down in writing(*d*), though it is best they should be so.

Limitation of Action.] The action must be brought within three calendar months after the offence committed(*e*). The day of the offence would, it seems, be reckoned exclusive(*f*). If an action be brought by a termor upon this statute for an injury done to his house within three calendar months from the offence committed, and that action abates by the death of the termor, after the three months have expired, his executor cannot bring a fresh action(*g*). And it is a matter of doubt whether an executor of a termor can, in *any* case, bring an action upon this statute for an injury sustained in the lifetime of his testator.

Limitation of
Action.

(*t*) See 3 Burn's J., 28th ed., tit. "Hundredors."

(*u*) See Bull. N. P. 186.

(*x*) *Pellew v. Hundred Wonford*, 9 B. & C. 135.

(*y*) See *Duke of Somerset v. Hundred Mere*, 4 B. & C. 167; 6 D. & R. 247, S. C.: *Nesham v. Armstrong*, 1 B. & Ald. 146; but see *Lowe v. Inhabitants of Broxtowe*, 3 B. & Ad. 550.

(*z*) *Rolfe v. Hundred Elthorne*, 1 M. & M. 185.

(*a*) See *Rolfe v. Hundred Elthorne*, 1 M. & M. 185: *Duke of Somerset v. Hundred Mere*, 4 B. & C. 167; 6 D. & R. 247, S. C.

(*b*) *Pellew v. Hundred Wonford*, 9 B. & C. 134.

(*c*) *Lowe v. Inhabitants of Broxtowe*, 3 B. & Ad. 550.

(*d*) *Graham v. Hundred Beantree*, B. N. P. 186. See several forms in Chit. Gen. Prac. of the Law, 1st ed., 580, 581.

(*e*) See the 3rd section.

(*f*) See *Pellew v. Hundred Wonford*, 9 B. & C. 135: *Norris v. The Hundred of Gawtry*, Hob. 139: 2 Rol. Abr. 520 a, pl. 8: 1 Brownl. 156: *ante*, Vol. I. 93.

(*g*) *Adam v. Inhabitants of Bristol* 4 Nev. & M. 144; 2 A. & E. 389, S. C.

BOOK III.

PART II.

Process to
compel Ap-
pearance.

Process to compel Appearance.] Formerly, the mode of proceeding to compel an appearance in this action was by original attachment and *distringas*, in the same manner as it used to be against corporations (*h*). Now, however, by the 2 *W. 4, c. 39, ss. 21, 1, 3*, the process against hundredors to enforce their appearance is the same as in ordinary cases, *viz.* by summons, or summons and *distringas*. The writ must be against “the men inhabiting within the hundred of —,” in the county of —,” or other like district generally, and not against any of them by name; otherwise, if the mistake be carried into the declaration, it would be bad even in arrest of judgment (*i*). Where the word “hundred” was inserted in the writ and proceedings instead of “borough,” the court allowed an amendment by substituting the one for the other (*k*). But it seems this cannot be done since 2 *W. 4, c. 39(l)*.

The writ must be served upon the high constable, or one of the high constables of the hundred or like district (*m*) in which the offence happened; who should, within seven days after such service, give notice thereof to two justices residing in and acting for the hundred, &c. (*n*). If the writ be against the inhabitants of a county of a city or town, or the inhabitants of a franchise, liberty, city, town, or place not being part of a hundred or other like district, it may be served on any peace officer thereof (*o*).

Appearance.

Appearance.] The high constable, upon being served with the summons, must enter an appearance, and defend the action for and on behalf of the inhabitants of the hundred or other like district, &c., as he may be advised (*p*). If he do not, however, the plaintiff may proceed as in other cases, and enter it for them. This appearance must be entered with one of the masters on or before the expiration of eight days after the service of the writ, inclusive of such service, as directed *Vol. I. 121*.

Declaration.

Declaration.] As to the form of the declaration, see 2 *Saund. 376, 376 b, e, f, 377 f, 379*; 2 *Chit. Pleading, 827 a*. The plaintiff cannot declare until the defendants have appeared, and then of course it is absolutely; the declaration is then delivered or filed as in ordinary cases.

Plea, &c.

Plea, &c.] The constable may allow judgment to go by default, with the consent and approbation of the two justices (*q*).

The defendant might formerly plead “not guilty,” and give all defences in evidence (*r*); but now, by the recent rules of *H. T., 4 W. 4*, such defences must be pleaded specially, as in other cases.

Amendment.

Amendment.] As this is not a penal action, it is within the

(*h*) See *ante*, 841.

(*i*) See 2 *Saund. 376 f*; *Id.* 375: *Johnson v. Jackson*, 2 D. & R. 439; 1 B. & C. 304. See the form, *Chit. Forms*, 498.

(*k*) *Horton v. Inhabitants of Stamford*, 2 Dowl. 96; 1 C. & M. 773; 3 Tyr. 869, S. C.

(*l*) *Roberts v. Bate*, 6 Ad. & El. 778.

(*m*) 2 *W. 4, c. 39, s. 13, ante*, Vol. I. 115.

(*n*) 7 & 8 G. 4, c. 31, s. 4.

(*o*) 2 *W. 4, c. 39, s. 13, ante*, Vol. I. 115.

(*p*) 7 & 8 G. 4, c. 31, s. 4.

(*q*) 7 & 8 G. 4, c. 31, s. 4.

(*r*) See *Vid. Ent. 211*: *Lil. Ent. 296*: *Hans. Ent. 4*: 1 *And. 158*.

statutes of jeofails, and is also amendable even after issue joined, in the same manner as any other civil action(s).

CHAP. II.
SECT. 2.

Evidence.] Hundredors are made competent witnesses by Evidence. the 7 & 8 G. 4, c. 31, s. 5.

Damages.] The plaintiff cannot proceed by action, unless Damages. his loss exceed 30*l.*; for a loss amounting to that sum or under, his remedy is by summary proceedings before justices at a special petty session(t).

As to the mode of assessing damages, &c., see *Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Ad. 273.

Costs.] The plaintiff in this action is entitled to costs if he Costs. recover(u). So the hundred will, it seems, be entitled to costs if the plaintiff be nonsuit, &c., as in other cases(x).

Execution.] The execution is by *fieri facias* against the Execution. inhabitants of the hundred, &c., generally, directed to the sheriff of the county in which such hundred, &c., is situate, and indorsed thus: "The within damages are to be levied according to the statute 7 & 8 G. 4, c. 31," adding the attorney's name and residence, and the day of the month and year(y). The 13th section of the act makes provision for executing writs in certain places. When this writ is delivered to the sheriff, instead of levying the amount on any of the inhabitants of the hundred, &c., he must proceed as directed by the 6th section of the act. The 7th section of the act points out the mode of reimbursing the high constable for his expenses in defending the action. The 14th and 15th sections point out the mode of reimbursements in towns, &c., not in a hundred, but contributing to the county rate, and *vice versâ*.

(s) *Bearecroft v. Hundreds of Burnham and Stone*, 3 Lev. 347; *Merrick v. Hundred of Ossulston*, Hardw. 409; Andr. 115, S. C.

(t) See the 7 & 8 G. 4, c. 31, ss. 8, 9.

(u) 2 Saund. 378 b: *Ratcliffe v. Eden*,

Cowp. 485: *Witham v. Hill*, 2 Wils. 91.

(x) *Gretham v. Hundred of Theele*, 3 Burr. 1723.

(y) See the form of writ, Chit. Forms, 498.

CHAPTER III.

ACTIONS BY AND AGAINST ATTORNIES AND OFFICERS OF THE COURT, AND AGAINST THE MARSHAL OR WARDEN.

SECT. 1. *Actions by Attornies and Officers*, 846, 847.2. *Actions against Attornies and Officers*, 847 to 849.3. *Actions against the Marshal or Warden for an Escape, &c.*, 849, 850.

SECT. 1.

*Actions by Attornies and Officers.*BOOK III.
PART II.Process in
Actions by.

FORMERLY, an attorney or officer of the Courts of Queen's Bench or Common Pleas had in most cases the right of suing in the court of which he was an attorney or officer by *attachment of privilege*; and, having brought the defendant before the court by that writ, he might have declared against him, and proceeded in the action as in ordinary cases. Now, however, the right of suing by this attachment of privilege is abolished by the 2 *W. 4, c. 39, ss. 21, 1, 3, 4*, and an attorney must, in all cases, sue in the same way as any other person must.

Privileges not
abolished by
2 *W. 4, c. 39.*

Inasmuch as this statute thus abolishes the writ of attachment of privilege, so as to leave an attorney no option as to whether he will sue by it or not, his other privileges are not in anywise affected by the statute, and those privileges still exist to the same extent as they did before the statute, when he sued by attachment of privilege (*a*). As to what privileges an attorney plaintiff has, and how they may be lost or waived, see *ante*, *Vol. I. 47 to 49*.

Delivery of
Bill.

Where the action is for costs for business done in a court of law or equity, a bill must, in general, be furnished to the client a month previously to the writ being sued out, as fully pointed out, *Vol. I. 69*; and a duplicate of the bill should be kept, in order to be given in evidence at the trial (*b*).

Venue.

The plaintiff, in transitory actions, suing by himself as an attorney (*c*), may lay the venue in Middlesex; and it cannot afterwards be changed upon the usual application by the de-

(*a*) *Meggison v. Cole*, MS., K. B., 11th June, 1833; *Lewis v. Kerr*, 2 M. & W. 226; 5 Dowl. 447, S. C.: and see *Dyer v. Long*, 4 Dowl. 630.

(*b*) *Vol. I. 85.*

(*c*) *Harrington v. Page*, 2 Dowl. 164: *Lowless v. Timms*, 3 Dow. 707.

fendant, as in ordinary cases (*d*); and this although he has not entered his certificate (*e*). The other proceedings are, in general, the same as in proceedings against ordinary persons.

CHAP. III.
SECT. I.

SECT. 2.

Actions against Attornies and Officers.

FORMERLY, an attorney or officer of the Courts of Queen's Bench or Common Pleas must have been sued in the court of which he was an attorney or officer, by *bill*. Now, however, this privilege of being sued by bill is abolished by the 2 W. 4, c. 39, ss. 21, 1, 3, 4, and an attorney must in all cases be sued as any other person.

Process
against.

Although this enactment abolishes the former mode of proceeding in an action against an attorney, his other privileges still continue. Therefore, when a sole defendant, and not sued *en autre droit* (*f*), he must as formerly be sued in the court of which he is an attorney; and if sued in another court, he might plead his privilege in abatement (*g*). As to the privileges of attornies when defendants, see *ante*, Vol. I. 47.

Attornies, unless expressly mentioned, are not affected by Court of Conscience acts, either as plaintiffs (*h*) or defendants (*i*); in some instances, however, attornies, as defendants, are subject to the jurisdiction of courts of conscience, by the express provision of the statutes regulating such courts; as in Westminster, (6 & 7 W. 4, c. cxxxvii. s. 49; and see 24 G. 2, c. 42, s. 1) (*j*), London, (5 & 6 W. 4, c. xciv. s. 22; and see 39 & 40 G. 3, c. civ. s. 10), the Tower Hamlets, (19 G. 3, c. 68, s. 24), Southwark, (4 G. 4, c. cxxiii. s. 7), and the eastern half of the hundred of Brixton, (*lb*), when they reside within such jurisdictions respectively. Therefore, for debts within the cognizance of these courts, attornies residing within their jurisdiction must be sued there, and not in the superior courts. But in an action against an attorney, where there is a verdict for less than 40s. damages, the judge at *Nisi Prius* may, it seems, as in other cases, certify under the 43 Eliz. c. 6, to prevent the plaintiff from recovering his costs (*k*).

Being sued in
Courts of
Conscience.

An attorney or officer of the court, as we have already seen, (*Vol. I.* 468), cannot in general be holden to bail; but in some

Discharge
from and
Remedy for

(*d*) *Partington v. Woodcock*, 2 Dowl. 550: *Meggison v. Cole*, MS., K. B., 11th June, 1833: *Pope v. Redfearne*, 4 Burr. 2027: *Yeardley v. Roe*, 3 T. R. 573: see *Lewis v. Shelley*, 7 Taunt. 146: *Mounsey v. Watson*, 7 B. & C. 683.

(*e*) *Partington v. Woodcock*, 2 Dowl. 550.
(*f*) *Newton v. Rowland*, 1 Ld. Raym. 533; 1 Salk. 2, S. C.

(*g*) *Lewis v. Kerr*, 2 M. & W. 226: 5 Dowl. 447, S. C.: *Percival v. Cook*, 7 Dowl. 500: and see *Dyer v. Levy*, 4 Dowl. 630: *Davidson v. Chilman*, 1 Bing. N. C. 297; 1 Scott, 117, S. C. Before the 2 W. 4, c. 39, in all cases where an attorney was not expressly made subject to the jurisdiction of a court of conscience,

he must have been sued in the court of which he was an officer, and not elsewhere, however trifling the cause of action were. (See *Wiltshire v. Lloyd*, 1 Doug. 381: *Gardner v. Jessop*, 2 Wils. 42).

(*h*) *Johnson v. Bray*, 2 B. & B. 698: *Board v. Parker*, 7 East, 46.

(*i*) *Wiltshire v. Lloyd*, Doug. 366, 381: *Hodding v. Warrand*, 7 East, 50.

(*j*) He is not subject to the jurisdiction of the county court of Middlesex. (23 G. 2, c. 33: *Gardner v. Jessop*, 2 Wils. 43: *Wiltshire v. Lloyd*, 1 Doug. 380: but see *Silk v. Bennett*, 3 Burr. 1583: *Parker v. Vaughan*, 2 B. & P. 29).

(*k*) *Wright v. Nuttall*, 10 B. & C. 492; 5 M. & Ry. 454, S. C.

BOOK III.
PART II.Arrest on
Mesne Pro-
cess.

cases already pointed out (*ante*, 847, 848) he loses this privilege. If he be improperly arrested upon mesne process issuing out of the court of which he is an attorney the court, or a judge at chambers, will discharge him, upon entering a common appearance; but, if he be an attorney or officer of another court, his only remedy is by suing out a writ of privilege, and pleading it in abatement (*l*). Trespass is not maintainable for holding an attorney to bail, notwithstanding his privilege (*m*); the only form of remedy would be by action in the case, and then it would lie only where the arrest was with knowledge of the defendant's being an attorney (*n*). The application for the discharge should be made without delay (*o*). As to the mode of suing out a writ of privilege, and obtaining a *supersedeas* thereon, where the arrest is under process from an inferior court, see *Vol. I.* 469.

Appearance.

An appearance is entered, &c., as in ordinary cases. (*Vol. I.* 121).

Declaration.

The time for declaring and mode of declaring are the same as in ordinary cases (*p*). An attorney or officer, when a defendant, has not the privilege of changing the *venue* to Westminster, when laid in any other county (*q*), unless upon the usual affidavit, as in ordinary cases (*r*).

Plea, &c.

Formerly, when the proceedings in the Queen's Bench were by bill, if the copy of the bill were delivered on or before the last day of the term, the defendant must have pleaded within the four days, whatever might be the distance of his residence from London (*s*), or wherever the *venue* was laid (*t*); but if the copy was not delivered within that time, the defendant might plead at any time within the four first days of the following term (*t*); and the notice must have been indorsed on the copy of the bill accordingly. In accordance with this practice, it should seem, that, notwithstanding the new mode of proceeding against an attorney introduced by the 2 *W.* 4, c. 39, he must plead to the declaration within *four* days, whatever may be his distance from London, or wherever the *venue* is laid (*u*), and this in either of the courts.

All the remaining proceedings in the action are the same as in ordinary cases.

(*l*) *Vol. I.* 468: see *Hopkins v. Squibb*, 1 L. Raym. 702: *Thomas v. Lloyd*, Id. 336; 1 Salk. 194, S. C.: *Dillon v. Harper*, Id. 328; 2 Salk. 545; 2 L. Raym. 898, S. C.: *Barber v. Palmer*, 6 T. R. 524.

(*m*) *Noel v. Isaac*, 1 C., M. & R. 753.

(*n*) *Whalley v. Pepper*, 7 C. & P. 506.

(*o*) *Bernard v. Winnington*, 1 Chit. Rep.

188: *Paul v. Garry*, 6 B. & C. 77 b.

(*p*) See *Vol. I.* 134, 140.

(*q*) *Yeardley v. Roe*, 3 T. R. 573: *Pope*

v. Redfearne, 4 Burr. 2027: *Pye v. Leigh*, 2 Bl. Rep. 1065.

(*r*) See Book IV. Part I. Ch. 6: see *Wigley v. Morgan*, 2 Str. 1049.

(*s*) *Mann v. Fletcher*, 5 T. R. 369: *Pasmore v. Goodwin*, 2 Salk. 517.

(*t*) R. E., 5 A. r. 3 a.

(*u*) See *Lowder v. Lander*, 5 Dowl. 684: *Brenton v. Lawrence*, 5 Dowl. 506; and *Mann v. Fletcher*, 5 T. R. 369.

SECT. 3.

Actions against the Marshal or Warden for an Escape, &c.

CHAP. III.
SECT. 2.

Process.] THE process for the commencement of any personal action against the marshal or warden is now, since the 2 *W.* 4, c. 39, ss. 21, 1, 3, the same as against any other person, viz. by summons, or summons and *distringas*, and is fully noticed *ante*, Vol. I. 102 to 133. The marshal must be sued in the Queen's Bench, and the warden must be sued in the Common Pleas, they being officers of the court, otherwise they might plead their privilege in abatement (*x*).

Process.

If the escape be *voluntary*, (that is, if it be with the consent, privity, or knowledge of the marshal or warden) (*y*), the writ may be issued at any time; but if it be *negligent* only, then it must be issued during the escape and before the party is re-taken or returned into the marshal's or warden's custody, for the marshal or warden may plead such retaking or return (*z*). You should always, therefore, when issuing the writ, have witnesses who can speak to its being issued whilst the party is out of custody.

When to be issued.

The Marshal of the Queen's Bench prison, or warden of the Fleet, being an officer of the court, cannot, in general, be holden to bail (*x*). The mode of proceeding, where he is improperly arrested as a common person, will be nearly the same as that pointed out *ante*, 848, as to attornies.

Marshal or Warden cannot be held to Bail.

Declaration.] The time for declaring and mode of declaring are the same as in ordinary cases (*a*). The *venue* is transitory. An amendment of the declaration may, in general, be allowed as in other cases (*b*). The defendant is entitled to a particular of the escape for which the plaintiff sues; and the judge's order for the particulars may require the precise day of the escape to be stated, and which the plaintiff must state in his particular if it is within his knowledge (*c*).

Declaration.

Plea.] The time, &c., for pleading, is the same as in ordinary cases, and if the defendant do not plead within the limited time, the plaintiff may sign judgment and proceed to execute a writ of inquiry, unless the action be in debt for an escape on final process, in which case the judgment is final. But if he plead, then the issue is made up, and proceedings in the action are as in ordinary cases. By stat. 8 & 9 *W.* 3, c. 27, s. 6, no retaking on fresh pursuit shall be given in evidence on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant that the prisoner escaped

Plea.

(*x*) Bro. Abr., Bille, pl. 29: 1 Doug. 213.

(*y*) See as to attornies, *ante*, 848.

(*z*) *Bonafofus v. Walker*, 2 T. R. 131.

An escape from the rules, without the marshal's knowledge, is not a voluntary escape.

(*a*) See *ante*, Vol. I. 134, 140.

(*b*) *Brazier v. Jones*, 6 B. & C. 196: *Barnes v. Eyles*, 2 Moore, 561; 8 Taunt. 512, S. C.

(*c*) *Davis v. Chapman*, 1 Nev. & P. 699: *Webster v. Jones*, 7 D. & R. 744: and see *post*, Book IV. Part I. Ch. 15, "Particulars of Demand."

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PART II.

without his consent, privity, or knowledge(*d*). And see further as to the plea, *ante*, Vol. I. 152, *et seq.*

Inspection of
Habeas Cor-
pus.

Inspection of Habeas Corpus.] In this action against the marshal for an escape, the court will compel him or his officer to permit the plaintiff's attorney to inspect the writ of *habeas corpus* and return, and the *committitur* indorsed thereon(*e*).

Shewing and
giving Inform-
ation as to
Prisoners, &c.

Shewing and giving Information as to Prisoners, &c.] By stat. 8 & 9 W. 3, c. 27, s. 8, if the marshal of the Queen's Bench, or warden of the Fleet, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to shew any prisoner committed in execution to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged an escape in law. And by section 9, if any person or persons, desiring to charge any person with any action or execution, shall desire to be informed by the said marshal or warden, or their respective deputy or deputies, or by any other keeper of any other prisons, whether such person be a prisoner in his custody or not, the said marshal or warden, or such other keeper of any other prison, shall give a true note in writing thereof to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof shall forfeit the sum of 50*l.*; and if such marshal, &c., shall give a note in writing that such person is an actual prisoner, or in his or their custody, every such note shall be accepted and taken as a sufficient evidence that such person was at that time a prisoner in actual custody.

Notice of
Escape.

Where a defendant escapes from the custody of the marshal, the latter, if served with the common side-bar rule, to bring the defendant into court, &c., must give notice of the escape to the plaintiff's attorney within the time limited by the rule(*f*).

Execution.

Execution.] The execution is the same as in ordinary cases.

(*d*) See 1 Saund. 35 n. See forms of & R. 570, S. C. pleas and affidavit, 3 Chit. Pl. 957, &c.

(*e*) *Fox v. Jones*, 7 B. & C. 732; 1 M.

(*f*) *White v. Stratton*, 1 Dowl. 550.

CHAPTER IV.

PROCEEDINGS BY AND AGAINST PRISONERS.

SECT. 1. *Against Prisoners who have been held to Bail, 851 to 860.*

2. *By Prisoners generally, 860 to 873.*

SECT. 1.

Proceedings against Prisoners who have been held to Bail.

It should be premised, that, in actions against prisoners, in which they have not been holden to bail, the proceedings are the same as in ordinary cases in actions against persons who are not prisoners. The present section will contain only the practice as to the process for detaining and holding to bail a prisoner already in custody, and proceedings against a defendant while he remains a prisoner in an action in which he has been held to bail. These will be considered under the following heads: *viz.*—

CHAP. IV.
SECT. 1.

Process, 851.

Bail, 852.

Declaration, id.

Plea, 853.

Proceeding to Trial or Final

Judgment, 855.

Issue, &c., 856.

Execution, 857.

Other Proceedings, 859.

Process.] The process by which a prisoner is detained and held to bail in an action, in respect of which he is not in custody, is the same as that by which defendants at large are arrested, *viz.* the writ of *capias* prescribed by the 1 & 2 V. c. 110, s. 3, which has been already treated of in the 1st Vol. p. 506. And though the act does not expressly refer to the case of a defendant in custody, yet writs of *capias* have, in many cases since its enactment, been issued by permission of a judge at chambers against prisoners who, though in actual custody, were yet, by collusion with their detaining creditor, or otherwise, about to obtain their discharge, and forthwith quit England. In cases, however, where the prisoner is in custody of the marshal or other officer other than the sheriff to whom the writ of *capias* is to be directed; these, inasmuch as the writ cannot be directed to any officer except a sheriff, or one who acts in the capacity of sheriff (*a*), the only mode of making it effectual appears to be by obtaining a warrant from the sheriff to the marshal, or warden, &c., making him a bailiff *pro hac vice*. Should the marshal or warden, &c.,

(a) *Per Parke B., Edwards v. Robertson, 7 Dowl. 859.*

BOOK III.
PART II.

refuse to receive such warrant, the court cannot compel him to do so; and the only way left is to get the marshal, &c., to give the bailiff notice when the debtor is likely to be discharged, and watch the opportunity of retaking him when he comes out (a).

Bail.

Bail.] As to the mode of putting in and justifying special bail, see *Vol. I.* 612.

Declaration,
&c.Time for de-
claring.

Declaration, &c.] As regards the time within which the plaintiff *must* declare against a prisoner at his suit, it was enacted by the 2 *W. 4, c. 39, s. 4*, that, "if a defendant be taken or charged in custody of the *sheriff*, upon the writ of *capias*, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may, before the end of the next term after the detainer or arrest of such defendant, declare against such defendant, and proceed thereon, in the manner and according to the directions of the statute 4 & 5 *W. & M. c. 21*." And in the notice or *warning* to be written under or indorsed on the writ of *capias* prescribed by that act, it was stated, that if a defendant, being in custody, should be detained on that writ, or if a defendant, being arrested thereon, should go to prison for want of bail, the plaintiff might declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution. There was also a notice of a similar effect introduced into the writ of detainer. Also, the rule of Hilary term, 3 *W. 4*, ordered, "that in all cases in which a defendant shall have been, or shall be, detained in prison on any writ of *capias* or detainer, under the statute 2 *W. 4, c. 39*, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, *the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof*, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute 2 *W. 4, c. 39, sched. No. 2*, unless further time to declare shall have been given to such plaintiff by rule of court, or order of a judge." But none of these regulations will, it seems, apply to the case of a prisoner arrested under the present writ of *capias*, in which nothing is said as to when the plaintiff is to declare, and such being the case, the time for declaring will, it is apprehended, be the same as in a non-bailable case, though the point is open to some doubt (b); and being so, it would, until it is settled, be safest to declare before the end of the term next after the arrest or render and notice (c). It may be here observed, that with

(a) *Edwards v. Robertson*, 7 Dowl. 859.

(b) See Mr. Lush's Treatise on the 1 & 2 Vict. c. 110, pp. 5, 6, in which he ably maintains a contrary position.

(c) In consequence of this doubt, it may be well here to state the following points as to the former practice: viz. if

the defendant escaped, and were retaken, the retaking would have been deemed a render within the meaning of the above rule, and the plaintiff would have had until the end of the term next after it to declare. (See *Mabson v. Butler*, Barnes, 382: and see R. T., 6 A: *Grimes v. Joseph*, 2 B. & B. 35; 4 Moore, 380, S. C.). If the

regard to insolvents detained under the 85th section of the 1 & 2 V. c. 110, it is clear that plaintiff need not declare within two terms, and it is doubtful whether he need declare at all (d).

The mode of declaring against a prisoner in custody of the sheriff, or in the prison of the court from which the *capias* issued, is thus:—*Engross two(e) copies of your declaration on plain paper. Indorse on each the notice to plead, as directed Vol. I. 152 (f). You may also indorse on them the usual demand of plea; and as to which, see Id. 158. Deliver one of the copies to the defendant, or (which is more usual) leave it for him at the office of the marshal or warden, if the defendant be in the custody of that officer; or with the gaoler or keeper of the sheriff's prison or gaol, if he be in the sheriff's custody(g). Then make an affidavit of service, and annex the other copy of the declaration to it; swear it before one of the masters of the court, file the copy and affidavit with him, and get from him an office copy of the affidavit, with a rule to appear and plead indorsed on it. Serve a copy of the rule on the prisoner or at the office of the marshal or warden, &c., in the same manner as the declaration. If a defendant in custody employ an attorney merely for the purpose of putting in bail, the delivery of a declaration to such attorney is not sufficient(h); and it seems that in no case a delivery to an attorney would be a good*

Mode of declaring against.

defendant were removed by *habeas* from the custody of the sheriff, and committed to the custody of the marshal, the plaintiff in that case would have had time to declare within the same time as if the defendant still continued in the sheriff's custody, namely, before the end of the term next after the original arrest. (R. H., 26 G. 3). So, if the defendant be removed from the Fleet by *habeas*, it would be deemed but a continuance of the same imprisonment, and the time limited for declaring would have been reckoned from the original commitment, &c. (*Rose v. Green*, 1 Burr. 439; *Tidd*, 354). Where the defendant was in custody upon joint process against him and another, and the other has not been arrested; as the plaintiff cannot declare until the other defendant has been brought in or outlawed, he may obtain time accordingly for that purpose, upon application to the court, or to a judge at chambers, upon shewing that he is using due diligence in proceeding to compel the appearance of, or to outlaw, the defendant, who is at large; (*Morton v. Grey*, 9 B. & C. 544; *Barnes*, 401, 396; 2 Sellon, 30; *Knight v. Parker*, 2 W. Bl. 759); but in no other case would the court grant a further time to declare where the defendant was in custody. Where the defendant is in custody of the marshal on a criminal account, he could not have been charged with a declaration without leave of the court or a judge; and until that leave was obtained he would not be entitled to be discharged for not declaring against him in due time. (*Altroff v. Lunn*, 9 B. & C. 395).

(d) See *Buzzard v. Bousfield*, 7 Dowl. 1; 4 M. & W. 368.

(e) It was formerly necessary, in the Queen's Bench, where the defendant was in custody of the sheriff, &c., to make three copies of the declaration: one to be delivered to the defendant, or left for him with the gaoler or turnkey; another

to be annexed to the original affidavit of such delivery, and filed with the clerk of the rules; and a third to be annexed to an office copy of such affidavit; on which latter copy a rule was given, with the clerk of the rules, for the defendant to appear and plead; and in default thereof, judgment might have been signed. (R. E., 5 W. & M., reg. 3, s. 2, (b), Q. B.; and see *Tidd*, Pract., 9th ed., 344, 5: *Tidd*, New Pract. 184). In the Common Pleas, the production of the copy of the affidavit to the prothonotary being dispensed with, (Imp. C. P., 7th ed., 666, 672: *Tidd*, New Pract. 184), it was only necessary to have the two copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey, and the other to be annexed to an affidavit of such delivery; upon which latter copy, the secondary would have given a rule for the defendant to appear and plead. And now, by a general rule of all the courts (R. H., 2 W. 4, r. 1, s. 36; 3 B. & Ad. 379; 8 Bing. 293; 2 C. & J. 178) of H. T., 2 W. 4, r. 1, s. 36, "When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served, and another filed, with an affidavit of service; (Append. to *Tidd's Sup.* 1833, 289, 290); upon the office copy of which affidavit a rule to plead may be given."

(f) According to *Clementson v. Williamson*, (1 Bing. N. C. 356; 1 Scott, 267, S. C.), where a prisoner has been served with a rule to plead, the notice to plead is not requisite. The want of a rule to plead is waived by the defendant's taking out a summons for time to plead. (*Nugee v. M'Donell*, 3 Dowl. 579).

(g) See 4 & 5 W. & M. c. 21; 1 B. T. R. 191. The gaoler or keeper must forthwith deliver the copy to his prisoner, under pain of an attachment. (R. E., 5 W. & M. r. 3, s. 7).

(h) *Dent v. Hallifax*, 1 Taunt. 493.

BOOK III.
PART II.Habeas where
Defendant in
Prison of an-
other Court.Form of De-
claration.When in Cri-
minal Cus-
tody.

service on a prisoner, unless, perhaps, under some special agreement (i).

If the defendant be a prisoner in the custody of the warden on process issuing out of the Queen's Bench, or in the custody of the marshal on process issuing out of the Common Pleas or Exchequer, it is, it seems, unnecessary to bring him up by *habeas corpus*, in order to charge him with a declaration (k); nor is it necessary where he is in the custody of the sheriff (l). The charging the defendant with a declaration without a *habeas corpus* where it is necessary does not render the declaration a nullity, and it is an irregularity only, which could be cured by pleading thereto or the like (m).

As to the form of the declaration, it is the same as in ordinary cases against a defendant who is not a prisoner (n).

If the defendant be in custody on a *criminal* account, leave of the court or of a judge must first be obtained, before he can be charged with a declaration or in execution on a civil action (o) (which rule includes prisoners for contempts (p), but not persons in custody under attachments for the non-payment of costs (q), or the like); though, if he accept a declaration, and suffer judgment to go against him without complaining, he has waived the advantage which he might have taken of the irregularity, and shall be bound by it (r). In a recent case, where one of two defendants was in custody of the marshal on a *criminal* charge, the Court of Queen's Bench allowed him to be brought up on a *habeas corpus ad respondendum*, to be charged with a declaration (s). This leave is

(i) See *per Patteson, J.*, in *Spencer v. Newton*, 1 Nev. & P. 827. It was there held, that appearing as an attorney before a judge for a prisoner in custody on a *capias ad respondendum*, does not constitute him attorney in the suit so as to entitle the plaintiff to leave the declaration at his office. In Price's Exch. Pract. p. 256, it is said, that if the defendant has appeared by attorney, the demand of plea should be made on the attorney.

(k) *Barnett v. Harris, per Taunton, J.*, 2 Dowl. 186; *Millard v. Millman*, 3 M. & Scott, 63; 2 Dowl. 723, S. C.; but see *Williams v. Macgregor, cor. Alderson, B.*, at chambers, 3rd December, 1836. The learned baron gave the following written judgment in the case, after having conferred with several other judges:—"In this case it appears that the defendant was arrested by *capias* from the Exchequer in the last vacation, and has removed himself also, in the course of the vacation, by *habeas corpus* into the custody of the marshal of K. B. In the course of the term, the plaintiff caused a declaration to be delivered, by leaving it with the officer of the K. B., instead of bringing the defendant up by *habeas corpus* into the Exchequer, and there charging him with a declaration. The defendant now applies to be discharged, on the ground that the plaintiff has not declared against him in due time, and contends that a declaration so delivered is no declaration at all; and, after considering the case, I am of opinion, that, according to the practice of the court, the declaration ought to have been delivered to him when brought up by *habeas corpus* for that purpose. The 2 W. 4, c. 39, s. 8, does not apply to cases like the present, in which a defendant is in cus-

tody of another court, and not that out of which process issues. But here the defendant has pleaded to the declaration. I think, after that, he cannot be allowed to treat the declaration as a nullity. I therefore, on this latter ground, discharge the summons." See the prior cases of *Sherson v. Hughes*, 5 T. R. 35; *Filkes v. Allen*, 2 Str. 1153; see also the point well investigated by Mr. Lush, in his Treatise on the New Imprisonment Act, p. 13, &c., and from which it may be collected that there is no reason for having the *habeas*.

(l) 4 & 5 W. & M. c. 21. Before that act the *habeas* was necessary in this case.

(m) See *Williams v. Macgregor, supra*.

(n) See the former Practice, R. M., 3 W. 4, r. 15; and see 4 & 5 W. & M. c. 21.

(o) *Crackall v. Thomson*, 1 Salk. 354; *Ramsden v. Mackdonald*, 1 Wils. 217; 1 W. Bl. 30, *nom. Ramsay v. M'Donald*, S. C.; *Coppin v. Gunnell*, 2 L. Raym. 1572; 2 Str. 873, S. C.; *Goodman v. —*, 1 Dowl. 128; *Altroffe v. Lunn*, 9 B. & C. 375; Tidd, 9th ed., 345. According to the recent case of *Grainger v. Moore*, (5 Dowl. 456; 1 Murphy & H. 20, S. C.), it was not necessary to obtain the leave of the court or a judge to charge the defendant in custody of the sheriff on a criminal account with a writ of *capias*, issued under the 2 W. 4, c. 39.

(p) *Pletwood v. Turty*, Prac. Reg. 325; *Allgood v. Howard*, Cas. Pr. C. P. 27.

(q) *Bonafous v. Schoole*, 4 T. R. 316.

(r) *Pepper v. Bowden*, Cas. Pr. C. P. 31; and see *Rose v. Christfield*, 1 T. R. 591; *Williams v. Scudamore*, 1 Chit. Rep. 396; Tidd, Prac., 9th ed., 345.

(s) *Ess (or Williams) v. Smith*, 3 Tyr. Rep. 363; 1 Dowl. 703, S. C.

usually given, if it be not inconsistent with the terms of a conditional pardon already granted to the prisoner (*u*), or the like, and particularly where the party is in prison for safe custody only, and not for punishment. If the prisoner be in custody on a criminal account in any other than the prison of the court or sheriff, he cannot be charged with a civil action at all; and, therefore, a prisoner under criminal process in Newgate, or the house of correction, or other such gaols, cannot be brought up by *habeas corpus* for the purpose of being charged in the custody of the marshal in a civil action, and re-committed to his former custody so charged (*x*). If the defendant be a prisoner in custody on a criminal account, in any other custody save that of the sheriff or warden, the Court of Common Pleas or Exchequer have no authority to have him brought up to charge him with a civil action, for it cannot change the custody, and then commit the defendant again upon criminal matter, like the Court of Queen's Bench, which is a court of criminal jurisdiction (*y*). And the Court of Exchequer in a late case refused an *habeas corpus* to charge in execution a defendant in custody under an order of the lords of the Admiralty (*z*).

It may be here added, that when the defendant is in custody, all papers, notices, &c., which do not ordinarily require personal service, may be delivered for him to the turnkey of the prison (*a*). As to the delivery to his attorney, see *ante*, 853.

Service of
Notices, &c.

Plea.] By *R. T.*, 3 *W.* 4, “in all actions against prisoners in the custody of the marshal or warden, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.” And see the practice, *Vol. I.* 152 to 194. As to the service of the rule to plead, see *ante*, 853.

Proceeding to Trial or final Judgment.] By a general rule of all the courts of *H. T.*, 2 *W.* 4, *reg.* 1, s. 85 (*b*), “the plaintiff shall proceed to trial, or final judgment, against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one.” Also in cases where the defendant is not a prisoner at the time of declaring, if he afterward be rendered in discharge of his bail, then the plaintiff must proceed to trial or final judgment against him within three terms after such render and notice thereof given, the term of the notice and render being deemed one; otherwise the defendant shall be discharged by *superseas* (*c*).

Proceeding to
Trial or final
Judgment.

If the declaration be delivered or the render made in *vaca-*

(*u*) *Fost.* 61; *Foxworthy's case*, 2 *L.* Raym. 848; 7 *Mod.* 153; 2 *Salk.* 500, *S. C.*

(*x*) *Guthrie v. Ford*, 4 *D. & R.* 271: *semb.*, overruling *Morland v. Weston*, 3 *Id.* 31: and see *Brandon v. Davis*, 9 *East*, 154.

(*y*) *Walsh v. Davies*, 2 *New Rep.* 245: *Freeman v. Weston*, 1 *Bing.* 221; 8 *Moore*,

c. 81, *S. C.*

(*z*) *Jones v. Danvers*, 7 *Dowl.* 394; 5 *M.* & *W.* 234, *S. C.*

(*a*) *Whitehead v. Barber*, 1 *Str.* 248.

(*b*) See the former practice, *Tidd*, *New Pract.* 189.

(*c*) *R. H.*, 26 *G.* 3: *T.*, 2 *G.* 1, *Q. B.*: see 4 *T. R.* 664, *Q. B.*: *R. E.*, 8 *G.* 1, *C. P.*

tion, the preceding term would not, it is apprehended, be reckoned as one of the three terms(e). If the plaintiff's not having proceeded in the time above limited have arisen from the default of the court, as by the court's deferring to give judgment on a demurrer(f), or from the default of the defendant, by his neglecting to plead in time or the like—or, from the assizes at which the cause was to be tried not occurring within the time limited for the plaintiff's proceeding to trial(f); in these and the like cases the delay may be excused, and a *supersedeas* will not be granted. So, if the plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with the rule; for the delay would be the act of the court, and not of the plaintiff(g); but it would be otherwise, perhaps, if in such a case the plaintiff countermanded the notice of trial, and the cause were not tried until after the term. So, if the defendant demur to plaintiff's pleadings, and there are issues in fact besides, the plaintiff will not be bound to proceed within the time limited by the rule(h).

“Final Judgment,” what.

The term “final judgment,” mentioned in the rule, means a final judgment without a trial, as a judgment by default, on demurrer or on an issue upon *nul tiel* record, and not a judgment after verdict(i). And where two prisoners were sued jointly, and one of them pleaded to issue, and the other allowed judgment to go by default, and the jury who tried the issue against the one assessed the damages against the other: the court held it sufficient that the plaintiff had proceeded to trial against the one who pleaded to issue within the three terms, although he had not proceeded to final judgment against the other within that time(k). So, where a prisoner, after being charged with a declaration in Trinity term, 1819, absconded in the long vacation, and did not return into custody until Hilary term, 1820, the Court of Common Pleas refused to discharge him, although the plaintiff had not proceeded to judgment against him within Hilary term: the court saying, that the object of the practice as to *supersedeas* is, to prevent defendant from being imprisoned longer than is necessary to enable the plaintiff to proceed in the action; and here the defendant could not complain of the laches of the plaintiff whilst he was not actually in custody(l).

The plaintiff may also be excused from proceeding within the time above limited by the defendant's entering into some negotiation with him, or by the defendant's estate being vested in the provisional assignee of the Insolvent Court, on his application for his discharge under the Insolvent Act, as noticed *post*, 864.

Issue, &c.

[*Issue, &c.*] The issue, notice of trial, or inquiry, is made up as in ordinary cases, and delivered to the turnkey for the defendant, or to the defendant himself, if he have appeared in person(m).

(e) See *Thorn v. Leslie*, 3 Nev. & P. 305: *Colbron v. Hall*, 5 Dowl. 534: *Watson v. Dove*, 2 M. & W. 386: see *Heaton v. Whittaker*, 4 East, 349.

(f) *Huggins v. Bambridge*, Barnes, 383.

(g) *Myers v. Cooper*, 2 Dowl. 423.

(h) *Ferguson v. D'Arcy Mahon*, 2 Jurist, 820, Q. B., Bail Court.

(i) See *Heaton v. Whittaker*, 4 East, 349.

(k) *Wriglesworth v. Wright*, 13 East, 167.

(l) *Grimes v. Joseph*, 2 B. & B. 35; 4 Moore, 380, S. C.

(m) *Whitehead v. Barber*, 1 Str. 248.

CHAP. IV.
SECT. I.Execution
against.

Execution against.] By rule of all the courts of *H. T.*, 2 *W.* 4, r. 85, after ordering that the plaintiff shall proceed to trial or final judgment against a prisoner within three terms after declaration, as above mentioned, it is ordered that he "shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." A final judgment is complete at the time of signing it, without carrying in the roll (*n*). If the judgment be signed in term, the plaintiff has only the following term to charge the defendant in execution; but if in vacation, he has the two following terms allowed him for that purpose, the doctrine of relation to the preceding term being now put an end to by the rule of *H. T.*, 4 *W.* 4 (*o*). The same principle would, perhaps, be held applicable as to the charging the defendant in execution after a trial. Bringing an action on the judgment within the two terms is not equivalent to charging the defendant in execution (*p*).

Where Defen-
dant surren-
ders.

The above rule of *H. T.*, 4 *W.* 4, does not, it will be seen, apply in its terms to the case of a defendant becoming a prisoner by a surrender after trial or final judgment; but by rules of court previous to that rule, in case of a surrender in discharge of bail after trial had or final judgment, the plaintiff shall cause the defendant to be charged in execution within two terms next after such surrender, and the notice thereof, of which two terms, the term wherein such surrender shall be made shall be taken to be one (*q*). A render in *vacation* after trial had or judgment signed in *term*, is, it seems, to be considered as a render of the preceding term; but if the trial were had or judgment signed in vacation, and the render made in the same vacation, then it would be a render as of the succeeding term (*r*). The fact of the defendant being in the meantime removed by *habeas* to the prison of another court in a civil suit makes no difference (*s*).

Where Plain-
tiff is hindered
by Writ of
Error, In
junction, &c.

If the defendant hinder the plaintiff from proceeding by bringing a writ of error or obtaining an injunction, the plaintiff will not be entitled to charge him in execution within the time above limited, and consequently the defendant will not be entitled to a *supersedeas*, if the plaintiff proceed in due time after the writ of error has been determined, or the injunction dissolved (*t*). Or if one of several defendants bring a writ of error, the plaintiff is not bound to proceed against the others until the time limited after the writ of error has been determined (*u*). So, where the assignees of a bankrupt were prevented from charging the defendant in execution by a plea put in by him to their *scire facias*, the court refused a *super-*

(*n*) *Colbron v. Hall*, 5 Dowl. 534.

(*o*) *Colbron v. Hall*, 5 Dowl. 534: and see *Watson v. Dore*, 2 M. & W. 386.

(*p*) *Childs v. Prowse*, Willes, 531; *Barnes*, 390, S. C.; *Maud v. Branthwaite*, 2 Str. 943; *Pierson v. Goodwin*, 1 B. & P. 361.

(*q*) R. H., 26 G. 3. Q. B.; R. E., 8 G. 1, C. P.; and R. T., 26 & 27 G. 2, Exch.: 3 M. & W. 416.

(*r*) *Thorn v. Leslie*, 3 Nev. & P. 305; *Colbron v. Hall*, 5 Dowl. 534; *Smith v. Jefferys*, 6 T. R. 776; *Neill v. Loveless*, 3 Moore, 8; 8 Taunt. 674, S. C. The case of *Borer v. Baker*, (2 Dowl. 688; 1 A. &

El. 861, S. C.), is an authority against the position in the text; but that case may be said to have been overruled by that of *Thorn v. Leslie*. *Barter v. Bailey*, (3 M. & W. 415); *Foulkes v. Burgess*, (6 Dowl. 109), decided by the Exchequer, are also against the position; but those decisions were founded on that of *Borer v. Baker*.

(*s*) *Morris v. Magrath*, 3 B. & B. 301.

(*t*) See *Garrett v. Mantell*, 2 Wils. 380; *Laroche v. Wasborough*, 2 T. R. 737; *Maitland v. Macazaredo*, 6 M. & Sel. 139; *Stonehurst v. Ramsden*, 1 B. & Ald. 676.

(*u*) *Laroche v. Wasborough*, 2 T. R. 737.

BOOK III.
PART II.

Where Defendant takes Benefit of Insolvent Act.

How charged in Execution when in Custody of the Sheriff.

When in Custody at Suit of Plaintiff.

sedeas (v). Where the defendant, after rendering in discharge of his bail in an action in the Common Pleas, was committed to criminal custody for a misdemeanour and so continued, that court refused a *supersedeas* for not charging him in execution in due time, as they had no jurisdiction to remove him by *habeas* from the criminal custody in which he then was (x).

The plaintiff may also be excused from proceeding to execution within the time above limited by the defendant's entering into some negotiation with him, or by the defendant's estate being vested in the provisional assignee of the Insolvent Court, on his application to be discharged under the Insolvent Act, as noticed *post*, 864.

When the defendant is in custody of the sheriff, the mode of charging the defendant in execution is by lodging a *ca. sa. with the sheriff of the county in whose custody the defendant is, as in ordinary cases, and obtaining a warrant thereon directed to the gaoler or officer who has him (y) in custody*. The charging in execution is then complete; and although the defendant should be afterwards removed into the custody of the marshal or warden, it is not necessary for the plaintiff to take any other steps to charge the marshal or warden with his custody (z). If the defendant be in custody in the country, it will suffice to deliver the *ca. sa.* to the sheriff's agent in town; and in a case where it was so delivered within the two terms, although it did not actually reach the gaoler, in whose custody the defendant was, until after that time, it was held that the defendant was properly charged in execution (a). Where the defendant was in the county gaol, and a *ca. sa.* against him, at the suit of the sheriff, directed to the coroner, was handed by the coroner to the gaoler, this was held to be a sufficient charging of the defendant in execution (b). The plaintiff might remove the defendant from the sheriff's custody into the custody of the marshal, by a writ of *habeas corpus ad satisfaciendum*, and there charge him in execution. It is, however, wholly in the discretion of the court to grant such writ, and in most cases it would be refused as unnecessary and oppressive (c).

When the defendant is in the custody of the marshal, at the suit of the same plaintiff (d), the mode of charging him in execution is thus:—*Get a side-bar rule from one of the masters, requiring the marshal to acknowledge the defendant in his custody (e); take the rule to the marshal's office, and he will write*

(v) *Bibbins v. Mantell*, 2 Wils. 378.

(x) *Freeman v. Weston*, 1 Bing. 221; and see *Altroffe v. Lunn*, 9 B. & Cres. 395; see *Bonafous v. Schoole*, 4 T. R. 316; shewing that a defendant in custody on an attachment for non-payment of costs may be charged in execution.

(y) From the case of *Poole v. Cook*, (Barnes, 389), it would seem, that, to render the charging in execution complete, a warrant should also be obtained, and lodged with the gaoler of the prison in which the defendant is detained in custody; (and see *Astley v. Goodyer*, 2 Dowl. 619); but, according to *Tidd*, 9th ed., 363; 2 Lee, Dict. 1075; *Owen v. Owen*, 2 B. & Ad. 805; 1 Dowl. 385, S. C.; *Leach v. Johnson*, Id. 384; it seems the delivery of the *ca. sa.* to the sheriff in whose cus-

tody the defendant is, is sufficient. (*See quære*).

(z) *Searl v. Johnson*, 1 Dowl. 384; *Deemer v. Brooker*, 3 Dowl. 576; 1 H. & W. 206, S. C.

(a) *Williams v. Waring*, 2 C., M. & R. 354; 4 Dowl. 200; 1 Gale, 268, S. C.

(b) *Bastard or Burston v. Trutch*, 3 A. & E. 451; 5 Nev. & M. 109; 4 Dowl. 6; 1 H. & W. 321, S. C.

(c) See *Williams v. Jones*, 2 C. & J. 611.

(d) "The proceeding by side-bar rule does not operate to charge a prisoner in execution, unless he be at the time in custody in the particular suit." (*See per Lord Denman, C. J., in Furnival v. Stringer*, 5 Nev. & M. 60).

(e) See the form, Chit. Forms, 501.

the acknowledgment on it; pay him his fee. Next make out a committitur piece on a plain piece of parchment (f), and file it with one of the masters who acts as clerk of the judgments. And lastly, (although not essentially necessary) (g), enter the committitur in the marshal's book, which is kept in the judgment office; you will see the form of the entry there. The marshal's acknowledgment must be of the same term the defendant is charged in execution, and not of a preceding term, otherwise the defendant will be entitled to a *supersedeas* (h). If the committitur be erroneous, the plaintiff must give the defendant notice of his having abandoned it, before he can enter a second, rectifying the mistake (i). Formerly, in order to charge the defendant in execution, in the Queen's Bench, it was necessary to enter the proceedings of record, and to docket and file the judgment roll: but by the rule of *H. T.*, 2 *W.* 4, r. 95, "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record" (k).

When the defendant is in custody of the marshal at the suit of a third person, and not of the plaintiff, the mode of charging him in execution is, to sue out a writ of *habeas corpus ad satisfaciendum*, as directed post, *Book IV. Part I. Ch. 3*, and bring the defendant into open court thereon, in order to charge him in execution; and the defendant being brought into court in custody of the tipstaff, will be charged in execution (l). It is usual to give a brief to counsel to move that the defendant may be so charged. A plaintiff in prison at the suit of a third person may be charged in execution by this proceeding, by *habeas*, for the costs of a nonsuit, and the defendant is not compelled to resort to an action to recover them (m).

How when
in Custody at
Suit of third
Person.

Where the defendant is in custody of the marshal, charged with an execution in the Common Pleas or Exchequer, the mode of charging him in execution is by means of this writ of *habeas*, by which he should be brought up to the court in which the action is pending, and there be charged in execution.

When in Custody of Marshal, and Execution in C. P. or Exchequer.

When the defendant is in custody of the warden, the plaintiff must, in the same manner as noticed in the preceding cases, have him brought up by *habeas*, to have him charged in execution.

When in Custody of Warden.

When the defendant is in custody on a criminal account, leave of the court or a judge is necessary before he can be charged in execution in a civil action. (*See ante*, 854).

In Criminal Custody.

As to a *fiery facias* against a prisoner, see *ante*, *Vol. I.* p. 419. Fl. Fa.

As to the effect of the death of a prisoner in execution, see *ante*, *Vol. I.* p. 454. Death of Prisoner.

Other Proceedings against Prisoners.] As to an attachment Other Pro-

(f) See the form, *Chit. Forms*, 502.

(g) *MS.*, East, 1819.

(h) *Fisher v. Stanhope*, 1 *T. R.* 464.

(i) *Topping v. Ryan*, 1 *T. R.* 227; *Cunningham v. Cohen*, 10 *East*, 46.

(k) See *Deemer v. Brooker*, 3 *Dowl.* 576; 1 *H. & W.* 206, *S. C.*: *Tidd*, *New Pract.* 189; *Imp. K. B.*, 10th ed., 619; *Tidd*, 9th ed., 363; *Purden v. Brockridge*, 2 *B. &*

Cres. 342; *Fotterell v. Philby*, 3 *Burr.* 1841. See the form of the entry of the committitur on the roll, *Chit. Forms*, 502.

(l) See *Tidd*, 9th ed., 364; and per Lord Denman, *C. J.*, in *Smith v. Sandys*, 5 *Nev. & M.* 60; 1 *H. & W.* 377, *S. C.*

(m) *Furnival v. Stringer*, 3 *Bing. N. C.* 96; 5 *Dowl.* 195, *S. C.*

BOOK III.
PART II.ceedings
against Pri-
soners.

against, see *post*, *Book IV. Part III.*; as to a *cognovit* or warrant of attorney, see *ante*, 676, 683; as to when they must take advantage of an irregularity, see *post*, *Book IV. Part I. Ch. 17.*

SECT. 2.

Proceedings, &c., by Prisoners generally.

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| <p>1. <i>Rules and Regulations of the Prison.</i>
 <i>The Rules generally</i>, 860.
 <i>Day Rules</i>, 862.
 <i>Subsistence and Treatment of Prisoners</i>, <i>id.</i></p> <p>2. <i>Discharge of a Prisoner by Supersedeas.</i>
 <i>In what cases</i>, 864.
 <i>List of Prisoners supersedeable, &c.</i>, 865.
 <i>How Supersedeas obtained, &c.</i>, 866.</p> | <p><i>The effect of it</i>, 868.</p> <p>3. <i>Discharge of a Prisoner under the Insolvent Acts.</i>
 <i>Proceedings under stat. 48 G. 3, c. 123, s. 1</i>, 868.
 <i>Proceedings under the Lords' Act</i>, 871.
 <i>Subsequent Proceedings against Insolvents discharged under the Lords' Act</i>, <i>id.</i></p> <p>4. <i>Discharge of Prisoners by other means, id.</i></p> |
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1. *Rules and Regulations of the Prison.*The Rules
generally.

The Rules generally.] It may, perhaps, be necessary to premise, that in the prison of the Queen's Bench, which is more immediately the prison of the Court of Queen's Bench, and also in the prison of the Fleet, which is more immediately the prison of the Court of Common Pleas and of the Court of Exchequer, prisoners charged with civil actions merely (*n*), may have the benefit of the rules of the prison, upon entering into a bond with two sufficient sureties, as a security to the marshal or warden against escape, and upon paying the marshal or warden a certain per-centage upon the amount of the debts for which they are detained (*o*). These rules are certain limits beyond the walls of the prison, within which prisoners who have found sureties, &c., as above mentioned, may have leave to reside. A prisoner in custody for a contempt, is not, generally speaking, entitled to the benefit of them (*p*).

Extent of
Rules of Q. B.

The rules of the Queen's Bench extend from *Great Cumber-court*, in the parish of *St. George the Martyr*, in the county of *Surrey*, along the north side of *Great Suffolk-street*, as far as the *Star Brewhouse*; and from thence along the north-west side of *Gilbert's-lane* to the *Blackfriars-road*, and across the said road along the north-west side of *Welber-street*, to the *Half-way House*; and from thence along the western side of *Barron's-buildings*, and *St. George's-row* to the *Westminster-road*; and then across the said road, and along the western side of *St. George's Mall*, and from the pastry-cook's at the west end thereof, directly across to the lamp-post on the foot-

(*n*) See *Jones's case*, 2 Str. 817: *R. v. Buckland*, 1 Id. 413: *R. v. Bailey*, 9 B. & C. 67.

(*o*) See *R. H.*, 2 & 3 G. 4, r. 2: 5 B. & Ald. 560.

(*p*) *Hall v. Arnold*, 2 D. & R. 709.

path near the watch-house facing the *Dog and Duck*, and along the said foot-path from the said lamp-post, to another lamp-post on the eastern side of the said road facing *Hay's Nursery*; and then along the whole of the said road leading by *Prospect-place* to the *Elephant and Castle*; and from thence along the eastern side of *Newington Causeway* to *Great Cumber-court* aforesaid (q). The following places, however, within the above limits, are excepted; namely, "all taverns, victualling-houses, alehouses, wine vaults, houses or places licensed to sell gin or other spirituous liquors, and all places licensed for public entertainment. (*Ibid.*) By a subsequent rule of *R. T.*, 36 *G. 3*, the parish church of *St. George the Martyr*, within the borough of Southwark, and the adjoining church-yard, are to be deemed within the rules. And by the above rule, *E.*, 35 *G. 3*, it is also ordered, that the rules shall include "the house of correction for the county of *Surrey*, the new gaol, *Southwark*, and the gaol then building for the county of *Surrey*, and the highways (exclusive of the houses on each side thereof) leading from the King's Bench prison to the said gaols respectively."

The rules of the Fleet are comprised within the following bounds: that is to say, from the gate of the said prison in *Farringdon-street*, southwards along the east side of that street and *Bridge-street* to the end of *Chatham-place*; then crossing the road, returning northward along *Chatham-place* to *William-street*; and westward along *William-street*, northward along *Water-street*, and westward along *Crown-court*; northward up *Dorset-street*, along *Salisbury-square* and *Salisbury-court*, to *Fleet-street*; along *Fleet-street*, from *Salisbury-court* and *Shoe-lane* to the end of *Ludgate-hill* and *Bridge-street*, including both sides of the way in each of the said streets, places, courts, and squares, except *Farringdon-street*; and from the said gate northward, along the east side of *Farringdon-street* to *Fleet-lane*; up *Fleet-lane* eastward to the *Old Bailey*; along the *Old Bailey* southward to *Ludgate-hill*; up *Ludgate-hill*, and *Ludgate-street*, to the eastward to *St. Paul's Church-yard*, and from thence westward, down *Ludgate-street* and *Ludgate-hill*, to the corner of *Bridge-street*, including both sides of the way along the streets, lanes, and places last mentioned, and including the two churches of *St. Bride*, *Fleet-street*, and *St. Martin*, *Ludgate*, and the several houses in the streets, lanes, courts, alleys, and places, and boundaries before described, except *Arc Maria-lane*, *Creed-lane*, and *Blackfriars Gateway* on *Ludgate-hill*, which said houses and gateway shall not be deemed any part of the said rules (r).

Extent of
Rules of the
Fleet.

These rules, both of the Queen's Bench prison and of the Fleet, are considered to all intents as the prison itself; and if the prisoner break them, that is, if he go beyond the limits above described, the marshal or warden is answerable to the plaintiff as for an escape, in precisely the same manner as if the defendant had escaped from the prison; and the prisoner is thereby not only deprived of the privilege of residing within the rules in future, (unless the court upon application shall

Rules considered as Part
of the Prison.

BOOK III.
PART II.

otherwise order) (*r*), but also, it seems, from a case lately tried at the Surrey assizes, is liable to an indictment as for a breach of prison (*s*). See as to escape, where the prisoner is in custody upon mesne process, *Vol. I.* 543; and where the prisoner is in custody in execution, *Vol. I.* 452. See as to the action against the marshal, *ante*, 849.

Day Rules.

Day Rules.] Besides the liberty of residing within the rules above mentioned, the prisoner may in term time have a *day rule*, (that is, a permission from the court to go out of the prison or beyond the rules of the prison, for the purpose of transacting his business), upon application to the marshal or warden, according to whose custody the prisoner is in, and signing a petition to the court (*t*) for that purpose (*u*), and upon paying some trifling fee to the clerk of the day rules. The petition is afterwards read in court, and the prayer of it granted of course; but the rule (that is, a certificate of the court's having granted the prisoner a day rule, and which serves as protection to him from arrest, &c.) is in fact given to the prisoner in the morning, and probably before the petition is even presented; for it has been holden, that where the court grants the prayer of the petition, it has a retrospective effect, and warrants the day rules given under it, at whatever time in the morning they may have been granted (*v*). By *R. H.*, 45 *G.* 3, and *R. E.*, 30 *G.* 3, that every prisoner having a day rule shall return within the walls or rules of the prison at or before 9 o'clock of the evening of the day for which such rule shall be granted (*x*). Formerly a prisoner could have only three day rules in each term (*y*); but at present the number is not limited (*z*).

Subsistence
and Treat-
ment of Pri-
soners.

Subsistence and Treatment of Prisoners.] Allowances are to be made out of the county rates for the subsistence of prisoners (*a*). Justices may order parochial relief to prisoners in custody on mesne process in other than county gaols (*b*). By the 53 *G.* 3, c. 21, and 7 & 8 *G.* 4, c. 53, s. 113, the commissioners of the customs are to make allowances for the subsistence of prisoners confined under Exchequer process. Also by the 1 & 2 *V. c.* 110, s. 43, the Insolvent Court may order an allowance to a prisoner during his confinement &c.

Only Five in a
Room.

By *R. M.*, 7 *G.* 4 (*c*), not more than five prisoners are to lodge in one room in the prison, until the whole number of prisoners in the prison exceed 900.

Seniority.

By *R. H.*, 6 & 7 *G.* 4, *C. P.* (*d*), no prisoners shall be entitled to any room in the prison of the Fleet by reason of their seniority, except from the time of his being charged in the actions, in which he is not supersedeable (*e*).

Officers not to
sell to or

By *R. H.*, 7 & 8 *G.* 4, (*e*), no officer or person employed in

(*r*) *R. H.*, 57 *G.* 3, r. 1.

(*s*) See Burn's J., title "Escape."

(*t*) See the forms, *Chit. Forms*, 503, 504.

(*u*) See *Anon.*, 1 *Str.* 503; *R. M.*, 28 *C.* 2.

(*v*) *Field v. Jones*, 9 *East*, 151; see *Daniel v. Morewood*, 2 *L. Raym.* 92, *contra*.

(*x*) 6 *East*, 2; 3 *T. R.* 584.

(*y*) *R. E.*, 30 *G.* 3.

(*z*) *R. H.*, 45 *G.* 3.

(*a*) See 14 *Eliz.* c. 5, s. 37; 43 *Eliz.* c. 2, ss. 14, 15; and 53 *G.* 3, c. 113.

(*b*) 52 *G.* 3, c. 160.

(*c*) 6 *B. & C.* 123.

(*d*) 3 *Bing.* 442.

(*e*) 6 *B. & C.* 267.

the management or superintendence of the prison or prisoners shall be concerned in selling any article to, or doing any work for, any prisoner, on pain of being dismissed from his place by the marshal, who must remove him.

CHAP. IV.
SECT. 1.
work for Prisoners.

The rule of *T. T.*, 21 *G.* 3, directs, that the marshal of the Marshalsea of the Court of Queen's Bench shall permit no persons to enter into the prison without their being first searched, to see whether they have any spirituous liquors about them; and that he do not suffer the wives or children of any of the prisoners to lodge in the prison under any pretence whatsoever; and that the marshal do prescribe in what manner, and for how long, visitors shall be allowed to see or stay with the prisoners, according to the circumstances of every case, in his discretion. Attornies are entitled to be admitted to the interior of the Queen's Bench prison, when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. But the court will not make a general order upon the marshal to permit an attorney to go into the interior at all times to visit his clients (*f*).

Visits to Prisoners, how regulated.

The rule of *M. T.*, 3 *G.* 2, directs, that "the turnkeys of the said prison do diligently attend at the gate or door of the said prison, as the duty of their office requires, and do admit all such persons to have access to any of the prisoners as by law are entitled thereto."

By *R. E.*, 8 *G.* 4, C. P. (*g*), "it is ordered, that the warden do cause the gates of the said prison to be closed at the hour of ten of the clock at night until Michaelmas, and at the hour of nine of the clock at night between Michaelmas and Lady-day, and at the said hour of ten from Lady-day to Michaelmas in future, and that no person be admitted into the said prison during the last hour preceding that at which the gates are so to be closed, unless it be a new prisoner or in case of an emergency under the sanction of the warden or his deputy."

By stat. 32 *G.* 2, c. 28, s. 11, all prisoners in custody of the marshal, warden, sheriff, &c., may, in *term time*, petition the court out of which the process under which they are imprisoned issued, or under whose jurisdiction the prison in which they are confined is, or in *vacation* may petition one of the judges of such court, or a judge of assize, complaining of any exaction or extortion by any gaoler or other person employed in the keeping, &c., of the prison in which they are confined, or of any other abuse whatsoever committed or done by them in their respective offices; and the court or judge shall hear and determine the same in a summary way, and make such order for redressing the abuses complained of, and for punishing the officer, &c., and for making reparation to the parties injured, as they shall think just, together with the costs of such complaint; and such order may be enforced by attachment or otherwise, as other orders of the court (*h*). The court will not interfere under this act to relieve a debtor from alleged extortion, unless a *primâ facie* case of extortion is made out (*i*).

Extortion against Prisoners, how punished.

(*f*) *Re Jones & Matanie*, 1 Nev. & M. 128; 4 B. & Ad. 365, S. C.
(*g*) 4 Bing. 247.

(*h*) See R. H., 59 G. 3.
(*i*) *Ex p. Tighe*, 2 Dowl. 148.

BOOK III.
PART II.Modes of
Discharge
from Impri-
sonment.

The remainder of this section shall be confined to the consideration of the different modes by which a prisoner may be discharged from his imprisonment; and they shall be treated of in the following order:—

2. Discharge of a Prisoner by Supersedeas.

2. Discharge
of a Prisoner
by Superse-
deas.
In what
Cases, &c.

In what Cases, &c.] Before the recent Imprisonment for Debt Act (1 & 2 V. c. 110) came into operation, if a *declaration* were not delivered, and an affidavit thereof duly made and filed in due time, (as to which, see *ante*, 851, 852), by the plaintiff at whose suit he was in custody, the defendant might be discharged out of custody by writ of *supersedeas* or otherwise, upon entering a common appearance (*j*). It is, however, as we have seen, (*ante*, 852), questionable whether this would afford a ground for the discharge of a prisoner arrested under the provisions of that act, and for the reason stated in *Vol. I. p. 137*, it would seem not to be a ground of discharge. If the defendant plead to a declaration which was not delivered or filed in time to prevent his being supersedeable, he waives his right to the *supersedeas* (*k*).

For Plaintiff's
not proceed-
ing to Trial,
&c., in Time.

If the plaintiff do not *proceed to trial*, or (in case of judgment by default, demurrer, or issue upon *nul tiel* record) to *final judgment*, in due time, (as to which, see *ante*, 855), the defendant may be discharged by writ of *supersedeas*, or otherwise, upon entering a common appearance (*l*).

For Plaintiff's
not charging
him in Execu-
tion in Time.

If the plaintiff do not *charge the defendant in execution in due time*, (as to which, see *ante*, 857), the latter may be discharged out of custody by writ of *supersedeas* or otherwise, upon entering a common appearance (*m*).

Cases where
Laches no
Supersedeas.

There are many cases in which, by the act of the court, or of the defendant himself, the plaintiff may be excused from laches in not proceeding within the time otherwise limited for that purpose against the defendant, and in which the defendant will not therefore be entitled to a *supersedeas*; these have, for the greater part, been already noticed (*ante*, 857): to these it may be added, that if at any time pending the action, or before the defendant is charged in execution, there be a treaty or agreement for a settlement or compromise of the matters in dispute, no laches shall be imputed to the plaintiff, nor shall the defendant be entitled to his discharge for want of prosecution pending such treaty, &c. (*n*); provided such treaty or agreement be in writing, signed by the defendant or his attorney, or some other person duly authorized by him, and it be therein expressed that proceedings are stayed at the *defendant's request* (*o*). Also, by the recent act 1 & 2 V. c. 110, s. 41, "no prisoner whose estate shall by an order under this act have been vested in the said provisional assignee shall, after the making of such order, be discharged out of custody, as to any action, suit, or process for or concerning any debt, sum

(j) R. T., 3 W. 4: R. H., 26 G. 3.

(k) *Williams v. Macgregor*, *ante*, 854, n. (k): *Pearson v. Rawlings*, 1 East, 77: and see *Williams v. Scudamore*, 1 Chit. Rep. 386.(l) See the rules of court and practice, *ante*, 855.

(m) See the rules of court and practice

ante, 857.(n) *Walter v. Stewart*, 3 Wils. 455; 2 W. Bl. 918, S. C.: *Pitt v. Yalden*, 4 Burr. 2063.(o) R. H., 6 G. 3, Q. B.: R. H., 35 G. 3, C. P. See *Melton v. Hewitt*, 2 Dowl. 71; 1 C. & M. 579, S. C.

of money, damages, or claim, with respect to which an adjudication can, under the provisions of this act, be made by or by virtue of any *supersedeas*, judgment of *nonpross*, or judgment as in the case of a nonsuit, for want of the plaintiff or plaintiffs in such action, suit, or process, proceeding therein" (p).

If, by reason of a writ of error, order, agreement, or other special matter, the prisoner be not entitled to a *supersedeas*, which he would otherwise be entitled to for not proceeding in the prescribed time, the plaintiff must give a *written notice* of such writ of error, &c., to the marshal or warden, otherwise the prisoner will be entitled to the *supersedeas* (*infra*).

It is a general maxim, that a prisoner once supersedeable is always so, unless he has waived the right to a *supersedeas*; that is, if, for instance, he be supersedeable because a declaration has not been delivered to him in due time, the delivery of a declaration afterwards will not prevent him from being discharged on account of the previous default (q). So, if he be supersedeable for want of proceeding to trial or final judgment, he cannot prevent his discharge by afterwards proceeding to trial or final judgment: or if he be supersedeable for want of being charged in execution, if the plaintiff afterwards charge him in execution he will be entitled to his discharge (r). Nor can the defendant be taken on a *ca. sa.* on the same judgment where he was supersedeable for want of being charged in execution (s). And the only remedy the plaintiff has in such a case is by action on the judgment (t); and plaintiff, after judgment in that action, might take him on a *ca. sa.*, or charge him in execution (u). There is one exception, however, to this rule; namely, that if the defendant be once charged in execution, he cannot afterwards take advantage of any default of the plaintiff, other than a default in charging him in execution, provided he had an opportunity, previously to his being charged in execution, of applying for his *supersedeas* (x). Also, if the defendant be in custody in two actions, a *supersedeas* in one does not affect the right to proceed against him in the other (y).

It may be necessary to add, that defendant cannot again be holden to bail for the same cause of action (z).

List of Prisoners supersedeable, &c.] By general rule of all the courts of H. T., 2 W. 4, r. 86, "the marshal of the King's Bench prison, and the warden of the Fleet, shall present to the judges of the Courts of King's Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such pri-

Once supersedeable, always supersedeable.

List of Prisoners supersedeable, &c.

(p) See the prior statute, 7 G. 4, c. 57, s. 15; also the rule of H. T., 3 G. 4: 5 B. & Ald. 799; 1 D. & R. 472; 2 Chit. Rep. 377; 1 D. & R. 472: and see *Freeman v. Weston*, 1 Bing. 221; 8 Moore, 81, S. C.: 4 D. & R. 216, 347: *Holmes v. Murcott*, 1 Bing. 431; 8 Moore, 529, S. C.: *Molyneux v. Brown*, 2 Dowl. 84; 1 C. & M. 858, S. C.

(q) *Peachey v. Bowes*, Barnes, 368: *Melton v. Hewitt*, 2 Dowl. 71: *Colbron v. Hall*, 5 Id. 534: *Pierson v. Goodwin*, 1 B. & P. 361: Tidd, 9th ed., 357.

(r) *Melton v. Hewitt*, 2 Dowl. 71.

(s) *Line v. Lowe*, 7 East, 330.

(t) See *Topping v. Ryan*, 1 T. R. 275.

(u) *Blandford v. Foot*, Cowp. 72: *Ismay v. Dewin*, 2 W. Bla. 982.

(x) *Rose v. Christfield*, 1 T. R. 591: see *Morris v. Magrath*, 3 B. & B. 301; 7 Moore, 154, S. C.: *Line v. Long*, 7 East, 230.

(y) *Foy v. Percy*, 1 T. R. 592.

(z) Vol. I. 476. See *Hutchins v. Kenrick*, 2 Burr. 1048: but see *Gehegan v. Harper*, 1 H. Bl. 251.

BOOK III.
PART II.

Notice to
Marshal of
Cause pre-
venting Su-
persedeas.

soners as are supersedeable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable (a).

By *R. H.*, 2 *W.* 4, r. 87, "if by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any person detained in the *actual* custody of the marshal of the King's Bench prison, or warden of the Fleet, be not entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of the court, be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution within the times prescribed by such general rules and practice, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, *with all convenient speed, give notice in writing* (b) *of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody, by reason of such special matter.* And the marshal or warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison; and shall also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable" (c). One of the objects of requiring this notice to the marshal or warden is, that he may be better enabled to prepare the lists required by the rule *supra*. The rule extends only to prisoners in actual custody within the walls (d). Where the excuse for plaintiff's not proceeding arises from a demurrer, that is not a case contemplated by the rule, and plaintiff need not give notice thereof (e).

Discharge of
supersedeable
Prisoners.

Also, by *R. H.*, 2 *W.* 4, r. 88, "all prisoners who have been or shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet prison, as to all such actions in which they have been or shall be supersedeable" (f). This rule extends, however, only to prisoners in actual custody within the walls (g). And the marshal or warden cannot be compelled to judge when a prisoner is supersedeable, in order to discharge him under this rule, but the prisoner must apply to the court or a judge (h).

How Super-
sedeas ob-
tained, &c.

How Supersedeas obtained, &c.] The rules of *T.*, 3 *W.* 4, & *H.*, 26 *G.* 3, state, that the defendant shall be discharged in the several cases above mentioned, by *supersedeas* or other-

(a) See the former rules in *Q. B.* of *T.*, 56 *G.* 3; and *M. T.*, 57 *G.* 3; and 5 *B.* & *Ad.* 457.

(b) See form, *Chit. Forms*, 501.

(c) See the former rules in *Q. B.*, *T. T.* & *M. T.* 1816: 5 *B.* & *Ad.* 457: 5 *M.* & *Sel.* 522.

(d) *Siggers v. Brett*, 5 *B.* & *Ad.* 445.

(e) *Ferguson v. D'Arcy Mahon*, 2 *Jurist*, 820.

(f) By former rules of the Queen's

Bench and Common Pleas, prisoners in custody for six months after they were supersedeable, although not superseded, were to be forthwith discharged out of custody. (*R. T.*, 19 *G.* 3, *Q. B.*: 6 & 7 *G.* 4, *C. P.*)

(g) *Siggers v. Brett*, 5 *B.* & *Ad.* 455.

(h) *Robinson v. Cresswell*, 2 *M.* & *W.* 410; and see *Smith v. Eggington*, 2 *Nev.* & *P.* 143.

wise, according to the course of the court, upon entering a common appearance, unless, upon notice given to the plaintiff's attorney, good cause be shewn to the contrary. The mode, therefore, of procuring the defendant's discharge in the several cases above mentioned, is as follows:—

If the defendant be in the custody of the marshal, *get a copy of causes from the clerk of the papers at the prison; then, take out a summons requiring the plaintiff's attorney to attend, at the expiration of two days or more after the taking it out, before a judge, to shew cause why the defendant should not be discharged, &c. (i); and serve it upon the plaintiff's attorney or agent two days or more before it is returnable. One summons, so served, is sufficient (k). If the plaintiff's attorney consent to an order, get the consent indorsed on the summons, and the judge will make an order accordingly; or, if the plaintiff's attorney shew cause, but the cause be not deemed sufficient, the judge will make a like order; or, if the attorney do not attend, then, after waiting half-an-hour, make an affidavit of the service of the summons and of your attendance (l), and the judge will make the order (m). In town causes, this order is absolute, in the first instance; but, in country causes, it is usually but an order nisi, unless cause be shewn within four days, or such other time as the judge shall think reasonable, and which will afterwards be made absolute, if no cause be shewn (n). Upon the order being made, serve a copy of it upon the plaintiff's attorney, enter a common appearance, as directed Vol. I. 121, and get a certificate from one of the masters of your having done so. Then, take this certificate and order to the marshal's office, and the prisoner will thereupon be discharged without a supersedeas, upon payment of his fees.*

If in Custody
of Marshal.

But if the defendant be in custody of the sheriff, &c., *get from the gaoler a certificate of the causes the defendant is charged with (o); and make an affidavit of the gaoler's having signed the same (p). Then, take out a summons, and obtain and serve the order, and enter an appearance, as is above directed (q). Write out a præcipe for the supersedeas on plain paper, and write out the supersedeas on a plain piece of parchment (r); and take them, and the certificate of the master above mentioned, to one of the masters, who will sign the supersedeas; get it sealed. And lastly, leave the writ with the gaoler of the prison, who will thereupon discharge the defendant, upon payment of his fees (s).*

Of Sheriff.

The Effect of it.] We have already considered the effect of a supersedeas, ante, 865. The Effect
of it.

The rule nisi for the supersedeas is no stay of the proceed-

(i) See the form, Chit. Forms, 504.
(k) R. H., 2 W. 4, r. 89. By that rule it is ordered, that "the order of a judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment or execution in due time, may be obtained at the return of one summons served two days before it is returnable; such order in town causes being absolute; and, in country causes, unless cause shall be shewn within four days, or within such further time as the judge shall direct." See the former practice, Tidd, New Pract.

101.

(l) See the form of affidavit, Chit. Forms, 505.

(m) Id. 505.

(n) R. H., 2 W. 4, r. 89, *supra*, n. (k).

(o) See the form, Chit. Forms, 505.

(p) Id. 505.

(q) Id. 504.

(r) See the form of a supersedeas for not declaring, Chit. Forms, 506; for not proceeding to trial or final judgment, Id. 507; the like for not charging the defendant in execution, Id. 508.

(s) See *Jones v. Lander*, 6 T. R. 754.

ings, so as to prevent the plaintiff from proceeding to charge the defendant in execution (*t*).

3. Discharge of Prisoners under Insolvent Acts.

Proceedings
under stat. 48
G. 3, c. 123,
s. 1.

Proceedings under Stat. 48 G.3, c. 123, s. 1. "All persons in execution upon any judgment (*u*), in whatsoever court the same may have been obtained, and whether such court be or be not a court of record, for *any debt or damages* not exceeding the sum of 20*l.* *exclusive* of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as hereinafter mentioned, shall and may, upon his, her, or their application for that purpose in term time, made to some one of his majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody as to such execution by the rule or order of such court."

In what cases
Defendant en-
titled to his
Discharge.

The statute extends only to persons in actual custody, and a defendant who has merely had the rules of the prison is not within it (*v*). And the imprisonment, to entitle the party to his discharge, must be immediately previous to the application (*x*). The twelve months are reckoned inclusive of the day the party was charged in execution (*y*). Therefore, a defendant charged in execution on the 27th November, may apply on the 26th of November in the following year (*z*). The statute is not confined to parties in custody for *debts*; it extends to a party in custody in execution for damages recovered in an action of trover (*a*), or for an assault (*b*), or for crim. con. (*c*), or in an ejectment, though the damages be nominal (*d*). It applies only to persons in execution upon judgments in civil actions (*e*): it does not extend to a party in execution under a writ *de contumace capiendo* (*f*), or on an attachment (*g*). It seems doubtful whether it extends to *plaintiffs* in execution (*h*). The defendant is entitled to be discharged though the debt amounts to 20*l.* precisely (*i*). And although the sum for which a defendant has remained twelve months in execution exceeds 20*l.* by the *one shilling* damages, in an action of *debt*, he is entitled to his discharge; the excess beyond that sum being considered only as constituting costs (*k*). Where a defendant had given a warrant of attorney for debt and costs to an amount exceeding 20*l.*, although the original claim was less, and had remained in execution for

(*t*) *Robinson v. Cresswell*, 2 M. & W. 410.

(*u*) See *R. v. Dunne*, 2 M. & Sel. 201: *Roylance v. Hewling*, 3 Id. 282.

(*v*) *Barnard v. Symonds*, 5 Dowl. 520: *Sumption v. Monzani*, Id.; 2 M. & W. 311, S. C.: *Gilbert v. Pope*, 5 Dowl. 449; 2 M. & W. 311, S. C.; *sed vide Boughey v. Webb*, 4 Dowl. 320, where the defendant occasionally had day rules.

(*x*) *Stubbing v. M^r Grath*, 7 Dowl. 328.

(*y*) *Anon.*, 1 Dowl. 150.

(*z*) *Parkers v. Wilkins*, 7 Dowl. 152.

(*a*) *Smith v. Preston*, 1 H. & W. 93.

(*b*) *Winter v. Elliott*, 3 Nev. & M. 315; 1 A. & E. 24, S. C.

(*c*) *Goodfellow v. Robings*, 3 Bing. N. C. 1; 5 Dowl. 198, S. C.

(*d*) *Doe v. Sinclair*, 3 Bing. N. C. 778;

5 Dowl. 615, S. C.: *Doe v. —*, 1 Dowl. 69: *Doe v. Ward*, 2 M. & W. 65: *Doe Smith v. Payton*, 7 Dowl. 671: *sed vide Doe v. Reynolds*, 10 B. & C. 484.

(*e*) *R. v. Hubbard*, 10 East, 408: *Lewis v. Moreland*, 2 B. & Ald. 61: *R. v. Dunn*, 2 M. & Sel. 201: *R. v. Clifford*, 8 D. & R. 58.

(*f*) *Ex p. Kaye*, 1 B. & Ad. 652.

(*g*) *Doe Upton v. Bewson*, 1 Dowl. 15: *R. v. Hubbard*, 10 East, 408: *Pitt v. Evans*, 3 Dowl. 649.

(*h*) See *Tinmouth v. Taylor*, 10 B. & C. 114; 5 M. & R. 44, S. C.: *sed vide Roylance v. Hewling*, 5 M. & Sel. 282: *Bradley v. Webb*, 7 Dowl. 588.

(*i*) *Thomson v. King*, 4 Dowl. 582.

(*k*) *Fogarty v. Smith*, 4 Dowl. 595; 1 H. & W. 644, S. C.

that amount twelve successive months, he was held not entitled to his discharge under the act(*l*); nor is a prisoner entitled to his discharge under the act if the debt exceeds 20*l.*, although the excess consists of interest only, which has accrued after action brought(*m*). Though the judgment is in debt for 100*l.*, yet, if the execution against the defendant is for less than 20*l.*, he may be discharged out of custody under the above act, without reducing the judgment(*n*). It is no ground for refusing a party his discharge under this act, that he has been brought up under the compulsory clauses of the Lords' act, and has refused to deliver in his schedule(*o*). The statute contemplates cases where there might be proceedings against the *property* of the debtor(*p*). On an application for a prisoner's discharge under this act, it was objected, that, within the twelve months, he had several times broken the rules of the Queen's Bench prison; the court referred it to the master of the Crown Office to inquire into that fact, and if he found the prisoner had been out without a day rule, he was not to be discharged(*q*). Where the prisoner is lunatic, the application may be made by his wife(*r*). The right to be discharged under this act is not affected by the 1 & 2 *V. c.* 110, s. 41(*s*).

The application for discharge must be made to the superior court out of which the process issues(*t*), and cannot be entertained before a judge at chambers(*u*). If the action be in an inferior court, the application may be made to any of the courts at Westminster in term time(*v*).

To what Court he should apply.

The mode of proceeding, as pointed out by Mr. Chapman(*w*), in his useful work on the practice of the Court of Queen's Bench, is thus:—*Obtain from the keeper of the prison in which the defendant is confined a certificate of his commitment, with a copy of the causes. Serve a ten days' notice(x) on the plaintiff(y) or agent of the defendant's intention to apply to the court for his discharge. The signature to the gaoler's certificate must be verified by affidavit. Make also an affidavit of service of the notice on the plaintiff; the defendant must also make an affidavit(z) that the debt or damages for which he is confined in the action do not exceed 20*l.*, exclusive of the costs; and that he has been confined in prison thereon for the space of twelve calendar months. Give the gaoler's certificate and the affidavits, with a brief, for counsel to move for the defendant's discharge, and the rule will be absolute in the first instance(a).* In the Exche-

Application, how made.

(*l*) *Anon. v. White*, 1 Dowl. 19: Chapm. Pract. 330: *Robinson v. Lundell*, 6 Moore, 287. The reason, however, for such decision seems doubtful, and see *contra* on a cognovit, *Rathbone v. Fowler*, 6 Dowl. 81.

(*m*) *Cooper v. Bliss*, 2 Dowl. 749; 3 Moo. & Scott, 797, S. C.

(*n*) *Harris v. Parker*, 3 Dowl. 451.

(*o*) *Ex p. White*, 1 Dowl. 66: *Davis v. Curtis*, 3 Bing. N. C. 259; 5 Dowl. 344, S. C.: *Venner v. Oxenham*, 6 Dowl. 766: *Clay v. Bowler*, 6 Nev. & M. 814.

(*p*) *Ex p. Kaye*, 1 B. & Ad. 653.

(*q*) *Day v. Thomas*, Mich. 1826: Chap. Pract. 330.

(*r*) *Clay v. Bowler*, 6 Nev. & M. 814.

(*s*) *Chew v. Lye*, 7 Dowl. 465.

(*t*) *Pitt v. Evans*, 3 Dowl. 649.

(*u*) *Kelly v. Dickenson*, 1 Dowl. 546.

(*v*) *Short v. Williams*, 4 Dowl. 357.

(*w*) Chap. Pract. 327.

(*x*) See the forms, Chit. Forms, 509.

(*y*) *Post*, 870.

(*z*) See the form, Chit. Forms, 509.

(*a*) R. H., 2 W. 4, r. 90. By that rule, "a rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires." (See *Davies v. Rogers*, 2 B. & C. 894; 4 D. & R. 361, S. C.) It was formerly only a rule *nisi* in the Common Pleas. (7 Taunt. 37, 467).

quer, where a defendant is in custody of any other officer than the warden of the Fleet, a copy of the causes, certified by the gaoler or verified by affidavit, must be produced on the application (*b*). Draw up a rule, serve a copy on the plaintiff (*c*), and deliver the original rule to the sheriff or keeper of the prison in which the defendant is confined, to warrant the discharge. A notice of the application should be served on the plaintiff personally (*d*) and not his attorney, whose authority ended when the judgment was signed (*e*), unless indeed the plaintiff cannot be found (*f*), or unless the attorney still continues his agent (*g*). Service on one of two lessors of the plaintiff was held sufficient where the other had no interest, and could not be found (*h*). But it is not absolutely necessary to give this notice; though it is a great saving of expense to the prisoner, for if no notice be given, it is only a rule *nisi* (*i*) in the first instance. The name of the cause stated in the notice must correspond with the name of that in which he is in execution (*j*). That rule must be served on the plaintiff, (or his agent, if he have any, and the plaintiff cannot be found), an affidavit of the service made, and a brief given to counsel "to move to make the within rule absolute;" if no sufficient cause be shewn, the rule will be made absolute of course, and must then be drawn up and served as above (*k*). Where a defendant had remained in custody more than twelve months on *two* judgments for 10*l.* each, at the suit of the same plaintiff, it was held that there must be a separate motion in each case (*l*). The prisoner is entitled to his discharge as a matter of right, if the court are satisfied as to the fact of his imprisonment in actual custody for twelve months, &c. (*m*). Where the rule is only a rule *nisi*, the court have no power to order cause to be shewn at chambers (*n*). If notice of the application for the discharge was given, and the application be successfully opposed in the first instance, no costs are allowed to the opposing creditor (*o*).

Proceedings where Discharge improperly obtained.

If the prisoner's discharge be unduly or fraudulently obtained by a statement to the court, which, if true, would entitle him to be discharged under the act, he is liable to be again taken in execution, and remanded by rule of court; but the sheriff or keeper of the prison who may have discharged him under a rule so obtained, is not to be liable to an action

(*b*) *Short v. Williams*, 4 Dowl. 357.

(*c*) *Johnson v. Routledge*, 5 Dowl. 579.

(*d*) *George v. Fry*, 4 Dowl. 273: see *Biddulph v. Gray*, 5 Dowl. 406.

(*e*) *Johnson v. Routledge*, 5 Dowl. 579: *Gordon v. Twine*, 4 Id. 580: *Kelly v. Dickenson*, 1 Id. 546.

(*f*) See *Bradley v. Webb*, 7 Dowl. 588.

(*g*) *Granger v. Wilkes*, 14 Leg. Obs. 116: *Shilcock v. Passman*, 7 C. & P. 289: *Wilson v. Mokler*, 1 Dowl. 549: *George v. Fry*, 4 Id. 273. If not served on the plaintiff, when it might have been, the defendant may still obtain a rule *nisi* for his discharge, to be served on the plaintiff. (*Johnson v. Routledge*, 5 Dowl. 579). Where the plaintiff is dead it is necessary to shew that there is no personal representative, before service of notice on the plaintiff's attorney will be deemed sufficient. (*Ex p. Richer*, 4 Dowl. 275; 1 H. & W. 518, S. C.) Where it appeared that

the plaintiff had died intestate, and that no administration had been taken out, but that his wife was living, a rule *nisi* was granted to be served on the wife and the attorney in the cause, which was afterwards made absolute. (Id.)

(*h*) *Doe Smith v. Payton*, 7 Dowl. 671.

(*i*) See *Ex p. Neilson*, 7 Taunt. 37: *Magnay v. Wilkes*, Id. 467: *Jones v. Fitz Addams*, 2 Dowl. 111; 1 C. & M. 855; 3 Tyr. 904, S. C.: *Moore v. Clay*, 4 Dowl. 5.

(*j*) *Kelly v. Dickenson*, 1 Dowl. 537.

(*k*) *Cowley v. Bussell*, 4 Taunt. 460: *Mence v. Graves*, Id. 854: *Nicholls v. Neilson*, 6 Id. 493: *Baker v. Sydee*, 7 Id. 179.

(*l*) *Anon.*, 3 Leg. Obs. 76.

(*m*) *Stacey v. Fieldsand*, 1 Dowl. 700: ante, 868.

(*n*) *Jones v. Fitz Addams*, 2 Dowl. 111; 1 C. & M. 855; 3 Tyr. 934, S. C.

(*o*) *Anon.*, 1 Dowl. 148.

for an escape in consequence of such discharge (*p*). If, therefore, a prisoner obtain his discharge fraudulently, an application must be made to the court for "liberty to sue out a new *ca. sa.* against the defendant;" this must be supported by an affidavit of facts, to shew in what manner the discharge was improperly obtained; give a brief to counsel, with the affidavit to move for the rule; it is a rule *nisi*, and must be served on the defendant, but does not require personal service; make an affidavit of service, and give a brief to counsel to move to make the rule absolute; if the rule be made absolute, then sue out the *capias ad satisfaciendum* in the usual way (*q*).

Proceedings under the Lords' Act.] The act of 1 & 2 V. c. 110, s. 119, enacts, that from and after the passing of that act, no prisoner for debt shall petition any court for his or her discharge under the Lords' Act, 32 G. 2, c. 28 (*r*). And the same section enacts, that no creditor of any prisoner shall petition any court for the exercise of the compulsory powers given against debtors under the provisions of the Lords' Act (*s*). The 36th section of the same act, however, empowers the detaining creditors of prisoners in execution, to apply, by petition, to the *insolvent* court, for an order to vest the defendant's estate in the provisional assignees of that court. Proceedings under the Lords' Act.

Subsequent Proceedings against Insolvents discharged under the Lords' Act.] By a discharge under the Lords' Act, (which we have seen cannot take place since 1 & 2 V. c. 110, s. 119), the debtor's person is for ever freed from arrest for the same debt (*t*); even if he subsequently promise payment, it has been considered he cannot be holden to bail on such subsequent promise (*u*). The judgment, however, remains in force; and execution may at any time be sued out against the debtor's "lands, tenements, rents or hereditaments, goods or chattels," other than and except his wearing apparel, tools, &c., to the amount of 10*l.*, as before mentioned (*v*). As to the mode of proceeding in such a case, see *ante*, 826. Subsequent Proceedings against Insolvents discharged under the Lords' Act.

4. Discharge of Prisoners by other Means.

A prisoner will be entitled to his discharge, if the attorney, whose name is indorsed on the writ, declares that it was not issued by him, or with his authority or privity (*x*). Where an Attorney disclaims the Writ.

As to what defects in an affidavit to hold to bail, or in a writ of *capias*, will entitle the prisoner to his discharge, see *Vol. I.* 484, 500, 520. Defect in Writ, &c.

(*p*) 48 G. 3, c. 123, s. 1.

(*q*) Chapm. Pract. 330.

(*r*) As to the law and practice, when these clauses of the Lords' Act were in operation, the reader is referred to Tidd's Practice, and Archbold's Pract., 2nd ed. Vol. II. 135 to 140.

(*s*) As to the law and practice when these provisions of the Lords' Act were in operation, see the 6th edition of this

Work, Vol. II. p. 917.

(*t*) See *Workman v. Leake*, Cowp. 22, 32, n.: *Pagett v. Wheate*, 2 Doug. 669.

(*u*) MS., M. 1814: *Wilson v. Kemp*, 3 M. & Sel. 595; Vol. I. 471. But this seems questionable. And see *Horton v. Moggridge*, 6 Taunt. 563, n.: *Hatt v. Verdier*, 2 W. Bl. 724.

(*v*) 32 G. 2, c. 28, s. 20.

(*x*) Vol. I. 51, 52.

BOOK III.
PART II.By perfecting
Bail.
On favourable
Termination
or Comprom-
ise of the
Action.

A prisoner shall be discharged upon putting in and perfecting bail at any time before judgment(*y*).

A prisoner shall also be discharged when the action is abated, discontinued, or decided in his favour. So, if the prisoner settle or compromise the debt with the plaintiff, the plaintiff (or more properly his attorney) shall give the defendant a discharge in writing; and upon this being lodged with the marshal or gaoler, the prisoner shall be discharged(*z*). Or, if, after judgment, he pay the amount of it to the plaintiff or his attorney, they are bound at their peril to discharge him; and where a defendant in execution tendered the amount of the judgment to the plaintiff and to his attorney, and required them to sign his discharge, which they refused to do, unless he would also satisfy a demand they had on him for costs on another account, the court held that the defendant might maintain an action on the case against them for his subsequent detention(*a*). As the attorney, in strictness, has a lien on the judgment for the amount of his costs(*b*), the discharge, more properly, should be given by him, as above mentioned; but a discharge by either will be sufficient. And where a plaintiff, having his debtor in execution for 500*l.*, entered up satisfaction on the roll by a different attorney from that he had employed in the cause, upon the defendant's agreeing to pay him 120*l.* at a future time; upon a motion to discharge the defendant, which was opposed by the plaintiff's attorney, on the ground of his *lien*, the court held that, although there appeared to be a fraudulent collusion between the plaintiff and the defendant, they had no power to detain the defendant in prison after satisfaction was entered up on the record(*c*). If the prisoner be in execution at the time of his discharge, his discharge amounts to a satisfaction of the debt, even although he was discharged upon giving a security, which, on account of an informality, afterwards became unavailable(*d*); but otherwise if he were in custody upon mesne process merely(*e*).

In case of
Bankruptcy.

If a prisoner become bankrupt, and obtain his certificate, if the debt for which he is in custody be provable under his commission, he shall be discharged out of custody upon application to a judge at chambers(*f*). Even before he obtains his certificate, if the plaintiff elect to prove under the commission, he must first discharge the defendant out of custody, before he will be permitted to prove(*g*).

After Death
of the Plain-
tiff.

Also, in a case where the wife of a prisoner became administratrix to the plaintiff, the court ordered the defendant to be discharged(*h*); and the Court of Common Pleas have gone so far as to discharge a prisoner in execution, after the plaintiff's death, upon service of a rule *nisi* upon the next of kin, and no

(*y*) See Vol. I. 612, 613.(*z*) See Vol. I. 543: see *Butt v. Conant*, 3 B. & B. 3; 6 Moore, 65, S. C.(*a*) *Crozer v. Pilling*, 6 D. & R. 129; 4 B. & C. 26, S. C.(*b*) See Vol. I. 86, 87.(*c*) *Marr v. Smith*, 4 B. & Ald. 466: *ante*, Vol. I. 87, 88.(*d*) *Ante*, Vol. I. 455: *Jaques v. Withy*,

1 T. R. 557.

(*e*) MS., H. 1822: *ante*, Vol. I. 477.(*f*) 6 G. 4, c. 16, s. 126. See Arch. Bkt. L. 210, 281, 4th ed.: *ante*, Vol. I. 470.(*g*) 6 G. 4, c. 16, s. 59. See Arch. Bkt. L. 109.(*h*) *Pyne v. Erle*, 8 T. R. 407.

cause shewn, it appearing that the next of kin did not intend to administer (*i*). But that court refused to discharge a defendant out of custody in execution at the plaintiff's suit, although the application was not made until eighteen months after the death of the latter, it appearing that he had appointed executors who were still alive, and had not assented to the discharge (*k*). And where administration had been taken out, that court refused, without the authority of the administratrix, to discharge the defendant out of execution after the death of the plaintiff, although his administratrix and assignees disclaimed all interest in the action (*l*).

(*i*) *Parkinson v. Horlock*, 2 New Rep. 240; *Broughton v. Martin*, 1 B. & P. 176; 145. and see *R. v. Davis*, Id. 336: but see (*l*) *Fothergill v. Walton*, 4 Bing. 711; 1 *Holmes v. Murcott*, 1 Bing. 431; 8 Moore, Moo. & P. 743, S. C. 529, S. C.

(*k*) *Dunsford v. Gouldsmith*, 8 Moore,

CHAPTER V.

ACTIONS BY AND AGAINST EXECUTORS OR ADMINISTRATORS.

SECT. I.

BOOK III.
PART II.*Actions by Executors or Administrators.*Limitation of
Actions by.

Limitations of Actions by.] If the time limited by the statute have not expired before the death of the testator or intestate, the executor or administrator may bring the action at any time within a year after the death (*a*); or, if the time limited have not expired within the year after the death, at any time before the expiration of such limited time. And if the executor bring an action, and die before judgment, his executor may bring a fresh action within a reasonable time afterwards (*b*). In an action by an administrator upon a bill of exchange payable to the intestate, but accepted *after his death*, it was holden that the statute began to run from the grant of the letters of administration, and not from the time the bill became due, there being no cause of action while there is no party capable of suing (*c*). But that case would have received a different decision, had the bill been due in the lifetime of the testator (*d*). By the recent act 3 & 4 W. 4, c. 42, s. 2, executors and administrators may bring an action for an injury to the real estate of the testator or intestate, provided the injury was committed within six months before the death of the testator or intestate, and provided the action be brought within a year after his death (*e*).

Process, &c.

Process, &c.] Though the plaintiff sue as executor or administrator, the process need not describe him as such; but the practice in the Common Pleas, in bailable cases, before the 2 W. 4, c. 39, was different (*f*): and to avoid any doubt on the question, it is best in that court to describe him in the process as executor or administrator. An executor or administrator may swear to the debt according to his belief; he is not obliged to swear positively to it, as he would be if he were not suing *in autre droit* (*g*). Executors who have holden a

(*a*) Bull. N. P. 150.(*b*) Id.: see *Knight v. Bate*, Cowp. 738; 63: and see in equity, *Freaker v. Crane-feldt*, 3 M. & Cr. 499: *post*, 877.

11 Mod. 455, S. C.

(*c*) *Murray v. East India Company*, 5 2 Nev. & P. 571, S. C.B. & Ald. 204: and see *Douglas v. Forrest*,1 Moo. & P. 663; 4 Bing. 686, S. C.: *post*,

877.

(*d*) See *Rhodes v. Smethurst*, 4 M. & W. 211.(*f*) See Vol. I. 513.(*g*) *Ante*, Vol. I. 487. See form of affidavit to hold to bail, by executor or administrator, Chit. Forms, 211.

party to bail without reasonable or probable cause, for a debt alleged to be due to their testator, are within the 43 G. 3, c. 46, s. 3 (*h*). If the plaintiff in an action, after having arrested the defendant, die, such arrest is no bar to a fresh arrest in an action by the executors (*i*).

It is not necessary for the executor or administrator of an attorney, before the commencement of an action, to deliver a bill of costs for business done by his testator or intestate (*k*).

Declaration and subsequent Proceedings.] We have already seen how far the declaration should correspond with the process or affidavit to hold to bail in bailable cases (*l*). The declaration is filed or delivered in the same manner as in ordinary cases.

Declaration and subsequent Proceedings.

By general rule of all the courts of R. H., 4 W. 4, r. 21, Plea. "In all actions by and against assignees of a bankrupt or insolvent, or executors, administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied."

The defendant may bring money into court (*m*).

If the plaintiff reside abroad, he may be compelled to give security for costs as in other cases (*n*).

Security for Costs.

The subsequent proceedings, together with the verdict, *postea*, judgment, and execution, are also the same as in ordinary cases (*o*). As to *scire facias* by an executor, &c., to revive a judgment obtained by his testator, &c., see *ante*, 819.

Other Proceedings.

Costs.] If the verdict be for the plaintiff, he is of course entitled to costs, as in ordinary cases. Previously to the statute, 3 & 4 W. 4, c. 42, s. 31, if the verdict were given for the defendant, the plaintiff in such case was not liable to costs (*p*), unless the cause of action accrued after the testator's or intestate's death (*q*), and the plaintiff might have brought the action in his own right (*r*). Also, previously to that act, the plaintiff was not liable to the costs of a nonsuit, unless the action were such that he might have brought it in his own

Costs.

(*h*) *Post*, tit. "Costs:" *Fesley v. Reed*, 5 B. & Ald. 515 a.; *Dronefield v. Archer*, Id. 513; 1 D. & R. 67, S. C.

(*i*) *Mellin v. Evans*, 1 C. & J. 82: *ante*, Vol. 1, 478.

(*k*) *Ante*, Vol. I. 72. As to taxing the bill, see Id. 77.

(*l*) Vol. I. 143, 144.

(*m*) *Crutchfield v. Scott*, 2 Str. 796.

(*n*) *Chevalier v. Finnis*, 3 Moore, 602; 1 B. & B. 277, S. C.: *post*, Book IV. Part I. Ch. 12.

(*o*) See *Chit. Forms*, 510.

(*p*) *Nichollas v. Killigrew*, 1 L. Raym. 436: *Martin v. Norfolk*, H. Bl. 528: *Wilton v. Hamilton*, 1 B. & P. 445. The reason of their not being liable was on account of the form of the statute which first gave the defendant costs not having included executors. (See *per Tindal, C. J.*, in *Wilkinson v. Edwards*, 1 Scott, 174; 3 Dowl. 130; and in *Southgate v. Crowley*, 1 Scott, 378).

(*q*) *Bollard v. Spencer*, 7 T. R. 358: *Hollis v. Smith*, 10 East, 293: *Goldthwaite v. Petrie*, 5 T. R. 234.

(*r*) *Goldthwaite v. Petrie*, 5 T. R. 234: *Cockerill v. Kynaston*, 4 T. R. 277: *Cooke v. Lucas*, 2 East, 395. As in trover for a conversion after the testator's death. (*Grimstead v. Shirley*, 2 Taunt. 116). Even if the declaration in an action by an executor or administrator contained a count on an account stated with the plaintiff as executor or administrator, and promise to him as such, he would, if he were nonsuited, or defendant obtained a verdict, be liable to the costs even before the above act. (*Dowbiggin v. Harrison*, 9 B. & C. 666: *Jobson v. Forster*, 1 B. & Ad. 6: *Slater v. Lawson*, Id. 893). But, in such case, as far as the pleadings were concerned, the defendant would be entitled to the costs of that count only. (Id.: and R. H., 2 W. 4, r. 74).

right (*s*); nor to costs on judgment as in case of a nonsuit (*t*). He was always, even before that act, liable to the costs of a *nonpros* (*u*); and to costs upon a discontinuance (*x*), or for not proceeding to trial according to notice (*y*), if he had knowingly brought a wrong action, or been guilty of a wilful default (*z*); otherwise not (*a*). And now, by that act, "in every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." As a general rule, since this statute, executors plaintiffs are liable to costs where they do not succeed; and it is incumbent on them to shew some facts, which may satisfy the court that they should be exempt in the particular case, and it is not enough to shew hardship in the case of the plaintiff, unless it be shewn that it was occasioned by the misconduct of the defendant; for the act being made for the benefit of defendants, the court will not take away that benefit unless they see clearly that the defendant has forfeited his claim to it (*b*). The fact that the plaintiffs were advised by counsel that a point of law, which was ultimately decided against them, was in their favour, or, at all events, that there was sufficient doubt to make it proper for the plaintiffs to take the opinion of a court of law upon it, is not sufficient (*c*). The conduct of the defendant in the course of the action, as, that there was greater prolixity of pleading than necessary, &c., will not be considered by the court in exercising their discretion as to relieving the executors from costs (*d*). But *mala fides* or misconduct on the part of the defendant in general will be considered (*e*). The discretion as to costs in actions by executors, given to the court or a judge by the above enactment, applies to those cases only where an executor, before the act, was exempt from costs (*f*); and therefore, in *assumpsit* on promises to an executor, the defendant on a nonsuit is entitled to his costs as of course under the 23 H. 8, c. 15 (*f*). The 3 & 4 W. 4, c. 42, is retro-

(*s*) See the instances mentioned in note (*q*), *supra*: *Hollis v. Smith*, 10 East, 293; *Cockerill v. Kynaston*, 4 T. R. 277; *Barnard v. Higdon*, 3 B. & Ald. 213; 2 L. Raym. 865.

(*t*) *Pickup v. Wharton*, 2 Dowl. 388; 2 C. & M. 401, S. C.: *Booth v. Holt*, 2 H. Bl. 277; *Bennett v. Coker*, 4 Burr. 1928.

(*u*) *Higgs v. Warry*, 6 T. R. 654; *Haues v. Saunders*, 3 Burr. 1584.

(*x*) *Melhuish v. Maunder*, 2 New Rep. 72; 1 Chit. Rep. 629 n.

(*y*) *Nunez v. Modigliani*, 1 H. Bl. 217; 3 Burr. 1585.

(*z*) *Harris v. Jones*, 1 W. Bl. 451; 3 Burr. 1451, S. C.

(*a*) *Bennett v. Coker*, 4 Burr. 1927.1

(*b*) *Godson v. Freeman*, 2 C., M. & It. 585; 4 Dowl. 543; 1 Tyr. & Gr. 35; 1 Gale, 329, S. C.: *Farley v. Bryant*, 6 Law, J., N. S. 87; 3 Ad. & El. 839, S. C.

Brown v. Crowley, 3 Dowl. 386; *Southgate v. Crowley*, 1 Hodges, 1; 1 Bing. N. C. 518; 1 Scott, 374, S. C.: *Wilkinson v. Edwards*, 3 Dowl. 137; 1 Bing. N. C. 301, S. C.: *Larkin v. Massie*, 4 Dowl. 239; 1 Gale, 270, S. C.: *Engler v. Twisden*, 2 Bing. N. C. 263; 4 Dowl. 330; *Prole v. Wiggins*, 3 Bing. N. C. 235.

(*c*) *Farley v. Briant*, 3 Ad. & El. 839.

(*d*) *Id.*: *supra*, n. (*a*).

(*e*) See *Southgate v. Crowley*; *Brown v. Croley*; *Godson v. Freeman*, *supra*.

(*f*) *Ashton v. Poynter*, 1 C., M. & R. 738; 3 Dowl. 465; 1 Gale, 57, S. C. The decision in *Lysons v. Barrow*, 4 Moo. & Sc. 463; 10 Bing. 563, S. C., cannot, it seems, be supported. See 3 Dowl. 471; 1 C., M. & R. 740, *per Parke*, B.: *Spence v. Albert*, 4 Nev. & M. 385; 2 A. & E. 785; 1 H. & W. 7, S. C.: *Woolley v. Sloper*, 3 Moo. & Sc. 248; 2 Dowl. 208, S. C.

spective in its operation(*g*). The application by the executor to be relieved from costs should be made before the taxation; otherwise, if granted, it will only be on payment of the costs of the application(*h*). The decision of a single judge as to the costs may be reviewed by the court(*i*).

SECT. 2.

Actions against Executors or Administrators.

<i>In what Court they may be sued,</i>	<i>ings, 878.</i>
877.	<i>Judgment, 880.</i>
<i>Limitation of Action, id.</i>	<i>Costs, 881.</i>
<i>Process and Declaration, 878.</i>	<i>Execution, Devastavit, &c., 882.</i>
<i>Plea and subsequent Proceed-</i>	<i>Other Proceedings, 883.</i>

In what Court they may be Sued.] EXECUTORS and administrators are not, unless expressly named, within the statutes by which courts of conscience have been established(*k*); and consequently, they may be sued in the superior court, however trifling the cause of action may be. Also, it may be necessary to remark, if the defendant be an attorney, or officer of the court, yet he is not entitled to his usual privileges when sued as an executor, &c.(*l*). In what Court they may be sued.

Limitation of Actions against.] An action cannot be maintained against an executor, until he has taken upon himself to act as such, or proved the will. Therefore, where a testator died abroad more than six years before the commencement of the suit, but his executors in this country had not proved the will, nor in any manner acted as executors, until within six years, the Court of Common Pleas held that the Statute of Limitations was no bar(*m*). But when the debtor died *after the statute had begun to run*, and (in consequence of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, the Court of Exchequer held that the debt was barred, and that the creditor was not entitled to a reasonable time after grant of probate within which to bring his action(*n*). Limitation of Actions against.

By the 3 & 4 W. 4, c. 42, s. 2, actions of tort may be brought against executors or administrators for any wrong done by the testator or intestate within six calendar months of his death to

(*g*) *Freeman v. Moyes*, 3 Nev. & M. 883; 1 A. & E. 338, S. C., *Littledale, J., diss.*: *Pickup v. Wharton*, 2 C. & M. 406: *Grant v. Kemp*, Id. 636: and see *Lakin v. Massie*, 4 Dowl. 239; 1 Gale, 270, S. C.: *Prole v. Wiggins*, 3 Bing. N. C. 235.
(*h*) *Ashton v. Poynter*, 1 Gale, 57; 1 C., M. & R. 738; 5 Tyr. 322; 3 Dowl. 465, S. C.
(*i*) *Lakin v. Massie*, 4 Dowl. 239; 1 Gale, 270, S. C.: overruling *Maddox v. Phillips*, 1 H. & W. 251; 5 Nev. & M. 370; 3 A. & E. 198, S. C.
(*k*) *Ailway v. Burrows*, Doug. 263: *Webb v. Brown*, 5 T. R. 535.
(*l*) *Newton v. Rowland*, 1 Salk. 2; 1 Ld. Raym. 533, S. C.
(*m*) *Douglas v. Forrest*, 1 Moo. & P. 663; 4 Bing. 686, S. C.: and see *Murray v. East India Company*, 5 B. & Ald. 204: *ante*, 874.
(*n*) *Rhodes v. Smethurst*, 4 M. & W. 63: and see in Equity, *Freakle v. Cransfeldt*, 3 Myl. & Cr. 499.

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the property, real or personal, of another; provided the actions be brought within six calendar months after they have taken upon themselves the administration of his estate, and the damages recovered are to rank as simple contract debts. Where an action *ex contractu* will lie, it may still be brought. Therefore, where the testator had wrongfully taken coal from the plaintiff's land and sold it and received the proceeds, though no direct evidence was given of the sum received, but merely of the fact of the sale, it was held that the plaintiff might bring money had and received for so much as was raised before the six months, and trespass under the above act for so much as was raised within the six months, the acts being distinct, and the two actions therefore not incompatible, although the plaintiff might have recovered for all in the action for money had and received (*o*).

Process and
Declaration.

Process and Declaration.] The executor or administrator need not be described as such in the process (*p*). Executors or administrators cannot be holden to bail, unless in cases where they have promised in writing to pay the debt of their testator or intestate, or (under a judge's order) when they have been guilty of a *devastavit* (*q*); and not even then, unless the debt be over 20*l.*, and they be about to quit England (*r*).

The declaration is filed or delivered as in ordinary cases.

Plea and sub-
sequent Pro-
ceedings.

Plea and subsequent Proceedings.] If the defendant allow judgment to go by default, or expressly confess the action, this is deemed a confession of assets, and he will be estopped from denying it afterwards in an action on the judgment suggesting a *devastavit* (*s*). He should therefore take care to plead regularly to the action, unless he wish to acknowledge assets. If the defendant dispute his being executor or administrator, he should plead it specially (*t*). The plea is delivered as in ordinary cases. The plea of *plene administravit*, or *ne unques* executor, need not, in the Courts of Queen's Bench or Exchequer, be signed by counsel (*u*). On account of costs, it is not advisable to plead any false plea (*x*).

Proceedings
upon *plene*
administravit
pleaded alone.

If the defendant plead *plene administravit* or *plene administravit præter*, alone, the plaintiff in his replication may either deny it, or he may confess it, and pray judgment of assets *in futuro*, upon the former plea (*y*); or, upon the latter, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. In the latter case the plaintiff may sign judgment of assets *quando acciderint*, &c. (*z*), after executing a writ of inquiry

(*o*) *Powell v. Rees*, 7 A. & E. 426; 2 Nev. & P. 571, S. C.

(*p*) *Ante*. Vol. I. 513.

(*q*) Vol. I. 473.

(*r*) See the 1 & 2 V. c. 110, s. 3.

(*s*) *Skelton v. Hawling*, 1 Wils. 258: but see *Bird v. Culmer*, Hob. 178.

(*t*) R. H., 4 W. 4, r. 21, *ante*, 875.

(*u*) Vol. I. 171.

(*v*) See *post*, 881. Before the 2 W. 4, c. 39, and the rule of M. T., 3 W. 4, r. 15, *ante*, Vol. I. 145, if the declaration was intitled generally of the term, although not filed, &c., or the action commenced until after the first day of it, and the de-

fendant wished, under the plea of *plene administravit*, to give in evidence an administration of assets upon the first or other day of the term previous to the commencement of the action, he should have moved the court that the plaintiff be obliged to intitle his declaration specially of the day when filed or delivered; (*Southouse v. Allen*, Hardw. 141); or he might, as he now may, give in proof, at the trial, the time at which the action was really commenced. (*Mann v. Adams*, 1 Sid. 432).

(*y*) See a form, Chit. Forms, 511.

(*z*) See *Mara v. Quin*, 6 T. R. 1.

when necessary (a): and when assets afterwards come to the hands of the executor, he may proceed against him by *scire facias*, as directed *ante*, 827, 828.

But if the defendant plead either of the pleas above mentioned, and also the general issue or other plea, and the plaintiff deny *both* in his replication, the issue is then made up, and the parties proceed in the ordinary way; or if the plaintiff add the *similiter* to the general issue, and confess the plea of *plene administravit* &c., and pray judgment of assets *in futuro*, &c., as above mentioned, then, after entering the replication in the issue, enter an award of the *venire* in this form: "*But because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, the sheriff is commanded*" &c., as in ordinary cases (b). In this latter case, if the plaintiff have a verdict, judgment is signed, and he proceeds as in ordinary cases against an executor who has pleaded a false plea; so that, if such plea be false within his own knowledge, (as a plea of *ne unques* executor, or the like), he would be personally liable, not only for the costs, but also, it seems, for the debt, and judgment and execution might be issued against him accordingly (c); or if not false within his own knowledge, (as a plea that the testator did not promise, or the like), he would be personally liable for the costs, and the judgment signed against him would be of assets *quando* &c., upon which the plaintiff might afterwards, when assets came to defendant's hands, have a *scire facias*, as is above mentioned, for the debt, and immediately have a *fi. fa.* or *ca. sa.* for the costs *de bonis testatoris, et si non, de bonis propriis* (d).

It is well settled, that if an action be commenced against an executor or administrator for any specific debt, it must be preferred by him in payment to others of the same class: and in that case, the executor or administrator would not be warranted in making any voluntary payment of such other debts to defeat the party of his remedy (e). Yet, although one creditor commence an action, if another creditor, in equal degree, commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor or administrator has it in his election to give a preference, by confessing judgment in the action of the one, and pleading such judgment to the action of the other (f). In case, therefore, a hostile creditor bring an action, and there be not sufficient assets to divide amongst the creditors, and the executor be desirous of making an equal division, or favouring any particular creditor or creditors of the same class, in preference to the hostile plaintiff, the course adopted is, to get one or more of the friendly creditors, whose debt, or joint debts, will fully cover the assets in hand, immediately to bring a friendly action or actions, and declare therein in the common form of debt, and

Confessing
Judgment so
as to prefer
a Creditor.

(a) See *ante*, 709, 723.

(b) See form, Chit. Forms, 515.

(c) See *post*, 881.

(d) See *Marshall v. Wilder*, 9 B. & C. 655; 1 Saund. 336 b, n. (10): and Chit.

Forms, 518.

(e) 11 Vin. Abr. 296: Com. Dig., Admin. c. 2: Toller, 288, 289.

(f) See note (e), *supra*, 931: Off. Ex. 145.

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let defendant suffer judgment against him by default; and, on this being effected, then to plead the judgment to the declaration of the hostile creditor. If such judgment be recovered after pleading to the action by the hostile creditor, and before trial, he may plead it within eight days after such judgment recovered (*g*).

Warrant of
Attorney by
one, bad.

If a warrant of attorney be given by one of several executors, to confess a judgment against all, the court will order it to be delivered up, &c. (*h*).

Verdict.

The verdict is in the affirmative or negative of the issue, as in ordinary cases (*i*).

Judgment in
general.

Judgment.] The judgment on demurrer, on issue of *nul tiel* record, by confession or *nil dicit*, is interlocutory or final, as in other cases. If interlocutory, it is the same as in ordinary cases; after which follow the award of the inquiry, return, and final judgment, as stated *ante*, 720. The final judgment after a writ of inquiry, or on a verdict against an executor or administrator, when he pleads a plea admitting his representative character, and the plaintiff takes issue on it or replies, is, that the debt, damages, and costs, or the damages and costs, shall be levied of the goods of the testator in the hands of the defendant, if he have so much thereof in his hands to be administered; and if not, then the costs to be levied of his own goods (*k*). Even where *non assumpsit* and *plene administravit* were pleaded, and the plaintiff confessed the plea of *plene administravit*, and took judgment of assets *quando acciderint* on that plea, and joined issue and obtained a verdict on *non assumpsit*, he was held entitled to judgment for his damages and costs, to be levied of the goods of the testator if sufficient, and if not, then the costs to be levied of the defendant's own goods (*l*).

On false Plea.

If the defendant plead a plea which is false within his own knowledge, (as *ne unques* executor or administrator, or the like), and it be found against him, the judgment is *de bonis testatoris si, &c., et si non, &c., de bonis propriis*, or perhaps unconditionally *de bonis propriis* (*m*).

On Plea of
Judgments
outstanding.

If an executor plead judgments obtained against *himself*, and any one or more of them be avoided by the plaintiff's pleading, the plaintiff shall have judgment against the executor *de bonis propriis* (*n*). But if he had pleaded judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them; if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many of the judgments are avoided as to leave assets in the executor's hands (*o*).

In Action sug-

In an action against an executor or administrator, suggesting

(*g*) *Lyttleton v. Cross*, 5 D. & R. 175; 3 B. & C. 317, S. C.: *Prince v. Nicholson*, 5 Taunt. 665; 1 Marsh. 280, S. C.: *Kitchen v. Bartsch*, 7 East, 53.

(*h*) *Elwell v. Quash*, 1 Str. 20: *ante*, 691.

(*i*) See form of *postea*, for plaintiff, Chit. Forms, 516; for defendant, *Id*.

(*k*) 1 Saund. 336: and see *Rouse v.*

Etherington, 1 Salk. 312; 2 L. Raym. 870, S. C. See forms, Chit. Forms, 518.

(*l*) *Marshall v. Wilder*, 9 B. & C. 655.

(*m*) Bro. Executors, 34: *Bull v. Wheeler*, Cro. Jac. 647; 1 Saund. 336 b.

(*n*) 1 Saund. 337 a, n: see *Marshall v. Wilder*, 9 B. & C. 655.

(*o*) *Id.*: but see several cases cited there to the contrary.

a *devastavit*, the judgment against the defendant shall be *de bonis propriis* (p). But where the action is brought against the executor of an executor, suggesting a *devastavit* by the former executor, the judgment against the defendant will be *de bonis testatoris* (q).

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gesting Devastavit.

Where an executor or administrator is charged and made liable as assignee, the judgment is of course *de bonis propriis* (r).

Against Executor as Assignee.

As to the judgment of assets *quando* &c., it has already been sufficiently treated of, *ante*, 878 (s).

Costs.] If there be a verdict for the defendant, he is entitled to costs as in ordinary cases. And the statutes by which costs are recoverable by a defendant in replevin, extend to avowries by an executor (t). So, if the defendant plead several pleas, and issue be taken on any one of them which is a total bar to the action, (as *plene administravit*, or the like), and the verdict thereon be found for the defendant, he will, as in other cases, be entitled to the general costs of the cause (u).

Costs.
For Executor Defendant.

When the defendant pleads *plene administravit*, or judgments outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs (v). Nor does he seem liable thereto when he pleads *plene administravit præter*, and the plaintiff admitting the truth of the plea, takes judgment of the assets admitted in part and for the residue of assets *in futuro* (y). It was formerly the practice in these cases not to allow the plaintiff his costs, even out of the future assets; but, in a modern case, the court held that the plaintiff was entitled to them out of such assets, and that judgment might be entered for them accordingly (z).

Against Executors on Judgment of Assets in futuro.

If an executor or administrator plead a plea which is false within his own knowledge, (as *ne unques* executor or administrator, or a release to himself, or a judgment recovered against himself, or the like), he is liable to costs to be levied *de bonis propriis* absolutely; or if he plead a plea which is false, but not so within his own knowledge, (as that the testator or intestate did not promise, or a judgment recovered against the testator, or the like), he is liable to costs to be levied *de bonis propriis* conditionally, provided there be not goods of the testator sufficient to satisfy them (a). Where

On pleading a false Plea.

(p) 1 Saund. 336 c. n. (1).

(q) 1 Saund. 219 e. n. (1).

(r) *Tilny v. Norris*, 1 Salk. 309; 1 L. Raym. 553, S. C. See as to rent, *Rubery v. Stevens*, 4 B. & Ad. 241: and as to repairs, *Tremeere v. Morison*, 1 Bing. N. C. 19.

(s) See forms of entry of judgment of assets *quando* &c., where *plene administravit* is pleaded and confessed, Chit. Forms, 511, 512; the like where the plea is denied, and verdict upon it for defendant, Id. 516; and see form of *scire facias* on judgment *quando*, Id.

(t) *Farnell v. Keightley*, 2 Rol. Rep. 457; Tidd, 887, 976.

(u) *Iggulden v. Terson*, 2 Dowl. 277; *Edwards v. Bethel*, 1 B. & Ald. 254; *Ragg*

v. Wells, 8 Taunt. 129; *Marshall v. Wilder*, 2 B. & C. 657; *Hogg v. Graham*, 4 Taunt. 135; and see *Hart v. Cutbush*, 2 Dowl. 456; *Probert v. Phillips*, 5 Dowl. 473; 2 M. & W. 40, S. C.

(z) Tidd, 9th ed. 980; *Hindsley v. Russell*, 12 East, 232; *Cox v. Peacock*, 4 Dowl. 134.

(y) Id.: Rast. Ent. 323; 8 Co. 134; 2 Saund. 226.

(z) *De Tastet v. Andrade*, 1 Chit. Rep. 629, 630, n.: *Williams on Exec.* 1222; *Butt v. Deschamps*, Tidd, 980; *Cox v. Peacock*, 4 Dowl. 134.

(a) *Ante*, 879; *Howard v. Jemmett*, 3 Burr. 1368; 1 W. Bl. 400, S. C.: 2 *Williams' Executors*, 1412.

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the defendant pleads a false plea and *plene administravit*, if the plaintiff take judgment of assets *in futuro* upon the latter plea, and go to trial upon the other plea, he will be entitled to costs if he obtain a verdict; and therefore in such case it is usual for the defendant to apply to a judge, to withdraw the false plea, which he will be permitted to do on payment of costs (*b*).

Execution,
Devastavit,
&c.

Execution, Devastavit, &c.] On an ordinary judgment against an executor or administrator, (that is, a judgment that the plaintiff do recover the debt and costs to be levied out of the assets of the testator if the defendant have so much, but if not, then the costs out of the defendant's own goods), the usual writ of execution against him, for the recovery of the debt, is a *fieri facias de bonis testatoris* (*c*); but if the sheriff return to this writ *nulla bona testatoris nec propria*, and a *devastavit* (*d*), the plaintiff may immediately sue out a *fieri facias de bonis propriis* (*e*), or an *elegit* (*f*), or a *capias ad satisfaciendum* (*g*), against the property or person of the executor or administrator, in as full a manner as in an action against him in his own right (*h*). You cannot, however, sue out these writs of execution against the property or person of the executor or administrator, upon a judgment *de bonis testatoris*, (which is the only one here intended), unless the sheriff have returned a *devastavit* (*i*). Therefore, if the sheriff return *nulla bona* merely, the plaintiff, if he can prove a *devastavit*, may either proceed by action of debt upon the judgment, suggesting a *devastavit*; and if the plaintiff succeed in that action, he may have execution against the defendant personally as in ordinary cases (*k*); or he may sue out a *scire fieri* inquiry (*l*), commanding the sheriff, that in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire if the defendant have wasted the goods of the testator; and if a *devastavit* be found (*m*), that he shall warn the defendant that he be in court upon a day mentioned, to shew cause why the plaintiff should not have a *fieri facias de bonis propriis* against him (*n*). The same notice must be given of executing a *scire fieri* inquiry, as in the case of a common writ of inquiry (*o*). Formerly, as no costs were recoverable in this proceeding by *scire fieri* inquiry, unless the executor appeared and pleaded to it, it was seldom adopted; but the usual remedy was by action of debt on the judgment, suggesting a *devastavit*, as above mentioned (*p*). But now, since, by the 3 & 4 W. 4, c. 42, s. 34, such costs are recoverable, whether the executor appear and

(b) *Dearne v. Grimp*, 2 Bl. Rep. 1275: & M. 532, S. C.
Marshall v. Wilder, 9 B. & C. 655.

(c) See the form, Chit. Forms, 518.

(d) See the form of such returns, Chit. Forms, 518, 519; and of entry thereof upon the roll, with award of *fi. fa.* or *ca. sa.* 1d. 519, 520.

(e) Doct. Plac. 169. And see forms, Chit. Forms, 519.

(f) 1 Crom. 346: 3 Bl. Crom. 414.

(g) 2 H. 6, c. 12: Bro. Executors, 12. See the form, Chit. Forms, 520.

(h) See Rast. 323 b, 326 a, pl. 6.

(i) *Ward v. Thomas*, 2 Dowl. 87; 1 C.

(k) 1 Saund. 219 a.

(l) See form, Chit. Forms, 521.

(m) See form of return and inquisition, Chit. Forms, 522.

(n) See 1 Saund. 219, n. (8), 303: *Morfoot v. Chivers*, 1 Str. 631; 2 L. Raym. 1395, S. C.: *Ward v. Thomas*, 2 Dowl. 87.

(o) *Biron v. Phillips*, 1 Str. 235: *Stead v. Lateward*, 1d. 623; 2 L. Raym. 1832, S. C.

(p) 2 Saund. 219 a.

plead to the *scire facias* or not, the remedy by *scire facias* may become more usual (*q*). See more particularly as to these two modes of proceeding, and what shall be evidence of a *de-rastavit*, 2 *Saund.* 219, n. (8); 2 *Williams' Executors*, 2nd ed. 1417, 1419.

On a judgment against an executor or administrator that the plaintiff do recover both the *debt* and *costs* in the first place *de bonis testatoris si &c.*, and *si non &c.*, *de bonis propriis*, (and which judgments usually given where the defendant pleads a plea which is false in his own knowledge, see *ante*, 881), the execution pursuing the terms of the judgment is a *fi. fa.* both as to debt and costs, *de bonis testatoris et si non de bonis propriis*; and on a return of *nulla bona nec testatoris nec propria*, then it seems a *ca. sa.* may be issued; or if the judgment be unconditionally *de bonis propriis*, then it would seem the execution might, following the judgment, also be unconditionally *de bonis propriis*. (See *ante*, 879, 880).

The usual writ of execution against an executor for costs on a judgment for the debt *de bonis testatoris*, is a *fi. fa. de bonis testatoris si &c.*, *et si non &c.*, *de bonis propriis* (*r*), or on a return of *nulla bona nec testatoris nec propria*, then a *ca. sa.* may be issued. The execution for the debt and costs is usually included in one writ.

If an executor or administrator be charged and made liable as assignee, the execution would be against him *de bonis propriis* (*s*).

Other Proceedings by or against Executors, &c.] The proceedings upon a writ of error by or against executors, will be found under the title "*Error*," in the first Volume. As to *scire facias* to revive a judgment against an executor or administrator, see *ante*, 819 to 824; and as to *scire facias* upon a judgment of assets *quando &c.*, see *ante*, 827 (*t*).

Other Proceedings by or against Executors, &c.

(*q*) See *Palmer v. Fletcher*, 5 Dowl. 315.
(*r*) See the form, Chit. Forms, 518.

(*s*) *Ante*, 880.
(*t*) See the form, Chit. Forms, 520.

CHAPTER VI.

ACTIONS AGAINST AN HEIR OR DEVISEE ON THE BOND, &c.,
OF ANCESTOR.

SECT. 1.

*Actions against Heirs.*BOOK III.
PART II.Liability of
Heirs.

Liability of.] AN heir is compellable to pay the judgment and specialty debts(*a*) of his ancestor, to the extent of the assets which have come to him by descent(*b*). Even if he alien the property which has descended to him, before action brought, he is still liable to the extent of the value of the property so descended(*c*). The debt is so far considered the debt of the heir, that he is sued in the *debet* and *detinet*, and not in the *detinet* only, though the omission of the *debet* would be aided by verdict(*d*). For simple contract debts, and debts by specialty, in which the heirs are not expressly bound, heirs or devisees are not liable *at law*; but, by the 3 & 4 W. 4, c. 104, all real estate of the debtor not charged with, or devised subject to, the payment of his debts, is made assets, to be administered in equity for payment of such debts after payment of debts by specialty in which the heirs are bound.

Process.

Process.] If there be no devisee, the action is against the heir only. If there be a devisee and heir, the action is against them jointly(*e*). If there be no heir, then the action is against the devisee only(*f*). There is no occasion to describe the defendant as heir or devisee in the process(*g*). The defendant cannot be holden to bail(*h*).

The Declara-
tion.

Declaration.] As to the declaration, see 2 *Saund.* 7 *d*; 2 *Chit. Pl.* 6th ed. 304, 384. It is filed or delivered as in ordinary cases(*i*).

(*a*) It does not seem from the wording of the 11 G. 4 & 1 W. 4, c. 47, s. 6, that that act gives any remedy against the heir or devisee, for breaches of covenant, where the damages are *unliquidated*, and the breach is subsequent to the death of the covenantor. (See *Farley v. Briant*, 3 Ad. & El. 839).

(*b*) As to what are to be considered assets by descent, see 2 *Saund.* 8 *d*, &c.

(*c*) 11 G. 4 & 1 W. 4, c. 47, s. 6, (Sir E. Sugden's Act), which act repeals the 3 &

4 W. & M. c. 14; 6 & 7 W. 3, c. 14; and 47 G. 3, c. 74.

(*d*) Com. Dig., Pleader, 2 E. 2: *Hope v. Bague*, 3 East, 2.

(*e*) 11 G. 4 & 1 W. 4, c. 47, s. 3: 2 *Saund.* 7, n. (4).

(*f*) Id. s. 4: and see *Wilson v. Knubley*, 7 East, 128, 133.

(*g*) *Ante*, Vol. I. 513.

(*h*) See Vol. I. 473.

(*i*) See Vol. I. 134.

CHAP. VI.
SECT. I.

The Plea.

What may be
pleaded by an
Heir.

Consequence
of false Plea.

Parol Demur-
rer abolished.

Plea.] Besides the defences which the ancestor might have set up to the action, the defendant may plead that he is not heir; or that he has paid other bond or judgment creditors, to the full extent of the value of the lands descended, before the commencement of the action(*m*); or that he retains, in order to pay judgment debts; or that he retains to pay his own bond or judgment debt; or that he has nothing by descent; or that he has nothing by descent excepting a reversion expectant on the life of another, in which case the plaintiff may take judgment of assets *quando acciderint*(*n*), and afterwards proceed by *scire facias* when the estate has come into possession, as directed *ante*, 827; but if the reversion were expectant on an estate for years, the defendant should confess assets in possession to the amount of the value of the reversion(*o*). The defendant cannot plead that there is an executor, who has assets; for the obligee may, at his election, sue either the heir or executor(*p*). Neither can he plead that he has laid out money beyond the amount of the rents in the repairs of the premises descended(*q*). The plea of *riens per descent* need not, in the Court of Queen's Bench or Exchequer, be signed by counsel(*r*).

If the defendant do not plead *riens per descent*, or some plea denying the plaintiff's cause of action, he must confess the action, and shew the certainty of the assets(*s*), for, by the common law, if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent(*t*), or if the defendant plead a fact which he knows to be false, and it be found against him, (as, when he pleads *riens per descent*, and it is found that he has received something, however small or insufficient, to discharge the debt(*u*)), the plaintiff (if he have not replied and taken issue according to the statute(*x*)), will be entitled to a general judgment and execution at common law for the debt, damages, and costs against the defendant, in the same manner as if it were for his own debt. And the law is the same, where the heir pleads payment by a co-obligor(*y*), or pleads a bad plea(*z*). But in such cases, if the plea be honest and fair, and the defect arise merely from mispleading, the court will allow the defendant to amend it(*a*). The plea of *non est factum*, however, is an exception to the above rule; for, if it be found false, still the judgment shall be of the lands descended only(*b*). Formerly, if the defendant were under age at the time of the action, instead of pleading, he might pray that the parol might demur until he should be of full age(*c*). But now, by the 11 G. 4 & 1 W. 4, c. 47,

(*m*) *Buckley v. Nightingale*, 1 Str. 665.
(*n*) *Anon.*, Dy. 373 b: *Smith v. Angell*, 2 L. Raym. 784.
(*o*) 2 Saund. 7 c.
(*p*) *Bro. Abr.*, Assets per Descent, 33: *Davy v. Pepys*, Plowd. 439 b: 1 P. Wms. 203.
(*q*) *Shetleworth v. Neville*, 1 T. R. 454.
(*r*) See Vol. I. 171.
(*s*) Plowd. 440: 2 Ro. Abr. 71: *Buckley v. Nightingale*, 1 Str. 665.
(*t*) *Smith v. Angell*, 7 Mod. 44.
(*u*) *Davy v. Pepys*, Plowd. 440: *Hind v. Lyon*, 2 Leon. 11: 2 Ro. Abr. 70, C.

pl. 2.
(*x*) 11 G. 4 & 1 W. 4, c. 47, s. 7: *Brown v. Shuker*, 10 Law Journ. 82; 2 C. & J. 311, S. C.
(*y*) *Brandlin v. Millbank*, Carth. 93; Comb. 162, S. C.
(*z*) *Smith v. Angell*, 2 L. Raym. 783; 1 Salk. 354, S. C.
(*a*) 2 Saund. 72 b.
(*b*) *Clothworthy v. Clothworthy*, Cro. Car. 437. *Sed quare*, if it be an exception to the rule, for such plea is not false within the defendant's own knowledge.
(*c*) Rast. Ent. 360 b, 362.

BOOK III.
PART II.

s.10(*d*), the parol is prohibited demurring, and, consequently, the defendant must plead.

Replication.

Replication.] If the defendant plead *riens per descent* at the time of the writ brought, the plaintiff may by statute reply that the defendant had lands &c. from his ancestor before the writ brought; and if issue be thereon joined, and found for the plaintiff, the jury shall then inquire of the value of the lands, &c., so descended, and the plaintiff shall have judgment of them(*e*); in which case the execution must, both for the debt and costs, be confined to the value of the lands descended(*f*). But if the plaintiff have judgment by confession, (without confessing the assets), or on demurrer or *nil dicit*, it shall be for the debt and damages, without any inquiry of the value of the lands descended(*g*). Or, instead of replying in this manner, the plaintiff may take issue on the plea of *riens per descent*, and if he have a verdict, he may have a general judgment and execution at common law, as above mentioned(*h*). Or it seems that, instead of replying, the plaintiff may confess the truth of the plea, and take judgment of assets *quando acciderint*.

Issue, &c.

Issue, &c.] The issue is made up, and the subsequent proceedings to judgment are the same as in ordinary cases. On an issue as to the value of the lands, the jury should of course find such value(*i*).

Judgment.

In general.

Judgment.] If the defendant have pleaded *non est factum*, or have confessed the action and shewn with certainty the assets descended, the judgment is *special*, that the plaintiff recover his debt, damages, and costs, to be levied of the lands descended(*k*); but, if he have pleaded *riens per descent*, and the plaintiff have taken issue thereon at common law, and it be found against defendant, or judgment be given against defendant on demurrer, or by default, *nil dicit*, or by confession, (without shewing the assets descended), or upon any other matter or ground whatsoever, the judgment may be *general*, in the same manner as if the action had been brought against the defendant for his own debt(*l*); or it may be *special*, as above mentioned, at the option of the plaintiff, if he think it more advantageous than the general judgment(*m*). Also, if the plaintiff shew that the heir has already received profits from the estate to the amount of the debt, and the defendant do not deny it, he may have a general judgment and execution presently(*n*).

When the
Heir has
aliened before
Action.

If the heir have aliened the lands previously to the suing out of the writ, he is expressly rendered liable for the specialty

(*d*) As to the construction of this section, see *Price v. Carver*, 3 Myl. & Cr. 157; *Esmonde v. Cook*, 1 Drury & W. 250.

(*e*) 11 G. 4 & 1 W. 4, c. 47, s. 7.

(*f*) *Brown v. Shuker*, 10 Law Journ. 82; 2 C. & J. 311, S. C.

(*g*) *Id.*: and see *Redshaw v. Hesther*, Carth. 354; Comb. 344, S. C.: 2 Saund, 8 a: and see the form of the replication, *Id.*

(*h*) *Matthews v. Lee*, Barnes, 444.

(*i*) *Brown v. Shuker*, 1 C. & J. 583; 1 Tyr. 400; 1 Price, N. R. 1, S. C.

(*k*) 2 Saund. 7 a, c. (n.): see the form, Chit. Forms, 523.

(*l*) 2 Saund. 7 a, b, (n.): *Brown v. Shuker*, 10 Law Journ. 82; 2 C. & J. 311, S. C.: Tidd, New Pract. 546.

(*m*) 2 Saund. 7 c.

(*n*) *Henningham's case*, Dy. 344 b.

debts of his ancestor, to the amount of the lands aliened, by stat. 11 G. 4 & 1 W. 4, c. 47, s. 6. If in such a case he plead *riens per descent* at the time of the writ brought, and the plaintiff reply assets before the writ brought, the jury shall find the value of the lands, and the plaintiff can have judgment and execution for debt and costs only to that extent(o), and not a general judgment against the heir, as at common law(p); or the plaintiff, instead of replying according to the statute, may take issue on the plea of *riens per descent*, and, if found for him, may have judgment either general or special, as before mentioned(q). But, although the defendant have not aliened the lands, the plaintiff may, if he wish, reply according to the statute, and have judgment accordingly(r); though, indeed, this would be an indiscreet mode of proceeding, if the value of the lands would not amount to the debt and costs.

Execution.] We have just seen that the judgment for plaintiff is general or special. If it be general, the plaintiff may sue out a *fieri facias*, *elegit*, or *ca. sa.*, as in ordinary cases, and as if the action were against the defendant in his own right(s). But if the judgment be special, that the debt be levied of the lands descended, and be not on a verdict upon which the jury (as they must have done) have already found the value of the lands descended, the plaintiff in such a case must sue out a special writ, in nature of an extent, commanding the sheriff to inquire by a jury of the lands descended, and to deliver them to the plaintiff, to hold until the debt, &c., be thereof fully levied(t). It seems, also, that the plaintiff, upon a general judgment, may have this special writ, if he prefer it to the general writs of execution, upon suggesting that the heir has particular lands by descent, and praying execution of the whole of them(u).

Execution.

Scire Facias on Judgment against the Ancestor, &c.

Scire Facias on Judgment against the Ancestor, &c.] What has now been stated, has, of course, reference only to actions against the heir; if the action were against the ancestor, and the judgment revived by *scire facias* against the heir and terretenants, the execution is by *elegit*(x); and, consequently, before the statute 1 & 2 V. c. 110, a moiety only of the ancestor's freehold could have been taken against the heir, even though he had pleaded a false plea(y); but now, by s. 11 of that statute, which has been already fully noticed in treating of execution by *elegit*, (*Vol. I.* 440), the execution extends to all the land, and to many other descriptions of real property not liable before that act, except, indeed, in certain cases already noticed, as against purchasers, mortgagees, and creditors. As to *scire facias* to revive a judgment against an

(o) 11 G. 4 & 1 W. 4, c. 47, s. 7.

(p) *Brown v. Shaker*, 3 C. & J. 311; 2 Tyr. 320; 10 Law Journ. 82, S. C.: *Radshaw v. Hesther*, Carth. 354; 2 Saund. 8 n.

(q) *Matthews v. Lee*, Barnes, 444: Saund. 8 a.

(r) 2 Saund. 8 n.

(s) See the form, Chit. Forms, 523.

(t) See 2 Saund. 8 n: 3 Bac. Abr. 25.

(u) *Bouyer v. Rivitt*, W. Jon. 87: 2 Ro. Abr. 71, 72, D. pl. 3.

(x) See Vol. I. 440.

(y) See *Anon.*, Dyer, 271 a.: 3 Bac. Abr. 25.

BOOK III.
PART II. heir and terretenants, see *ante*, 820; and as to *scire facias* on
a judgment of assets *quando &c.*, see *ante*, 827.



SECT. 2.

Actions against Devisees.

AN action is maintainable against a devisee, and is proceeded in, in the same manner and under the same circumstances as an action against an heir^(z).

The act 11 *G.* 4 & 1 *W.* 4, c. 47, s. 2, (Sir Edward Sugden's Act), renders wills in fraud of creditors void.

(z) See 11 *G.* 4 & 1 *W.* 4, c. 47, ss. 3, 4, 8.

CHAPTER VII.

ACTIONS BY AND AGAINST INFANTS.

SECT. 1.

*Actions by Infants.*CHAP. VII.
SECT. I.

Process.] THE process is to be sued out in the name of the infant, and not at the suit of the *prochein amy* or guardian. It is the same as in ordinary cases. It may be sued out before any *prochein amy* or guardian is appointed (*a*). The Process.

Prochein Amy, how Appointed or Removed, &c.] An infant cannot prosecute an action either in person or by attorney; and therefore it is that he cannot sue as an informer on a penal statute (*b*); for, an informer must exhibit his suit in proper person, and prosecute it either in person or by attorney (*c*). But he may sue either by *prochein amy* (*d*), or by guardian (*e*); usually the former. If he sue by attorney, although this cannot now be assigned as error (*f*), yet the defendant may plead it in abatement (*g*); or if he sue in person, perhaps it would be error. There is one exception, however, to this, namely, where several executors are plaintiffs, and one of them is an infant; in such a case, all the plaintiffs may sue by attorney, and those who are of age may appoint the attorney for themselves and for the infant (*h*). Prochein Amy, how appointed or removed, &c.

If an infant sue by guardian, the guardian, it seems, must have a *warrant*; if by *prochein amy*, a *warrant* is unnecessary; but both guardian and *prochein amy* must be admitted by the court, before the plaintiff can proceed in the action (*i*). *Let the person intended as prochein amy or guardian (being some friend of the infant, who is willing to prosecute the action for him (k)) attend with the infant before a judge at chambers, who will grant his fiat for one of the masters to draw up the*

(a) See Chit. Forms, 525.

(b) *Anon.*, Say. 51.

(c) 18 El. c. 5: B. N. P. 166.

(d) Stat. Westm. 1, c. 48: Westm. 2, c. 15.

(e) 2 Inst. 261.

(f) 21 J. 1, c. 13. s. 2: 4 & 5 A. c. 16, s. 2: *Finlay v. Jowle*, 13 East, 6.

(g) 2 Saund. 213, n. (5).

(h) 1 Ro. Abr. 288, pl. 3: *Rutland v. Rutland*, Cro. El. 378: 2 Saund. 213, n.

(6).

(i) F. N. B., 63, J.: 2 Inst. 261: *Young v. Young*, Cro. Car. 86.(k) The infant's father is usually appointed; but the court, on motion, or perhaps a judge at chambers, will appoint some other person to be the infant's guardian, with the concurrence of the father. (*Claridge v. Crawford*, 1 D. & R. 13).

BOOK III.
PART II.

rule(l), (or, in the Common Pleas he will at once grant the admission). In the Court of Queen's Bench and Exchequer draw up the rule with one of the masters(m), (or, in the Common Pleas, take the admission to the master's office, and get it entered on the remembrance roll; and leave the admission there). Annex a copy of the rule (or, in the Common Pleas, of the admission) to your declaration before you deliver it. It was formerly considered by the Queen's Bench, that a special admission of a guardian for an infant to appear in one cause would serve for others(n). But by rule of *H. T.*, 2 *W.* 4, r. 2, "a special admission of *prochein amy* or guardian to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified"(o). If the *prochein amy* or guardian and infant cannot attend, write out a petition to be signed by the infant, praying to be admitted to prosecute &c. by A. B.(p); and at the foot of it write a consent, to be signed by the *prochein amy*, &c.(p); and, lastly, make an affidavit of the signing of the petition and consent on plain paper(q). Let these be presented to the judge at chambers, who will thereupon grant his fiat, (or, in the Common Pleas, the admission), and you proceed to draw up the rule &c., as is above directed.

Change of
Prochein Amy
by Infant.

The infant cannot afterwards, without leave of the court or a judge, remove his guardian, nor can he disavow the action of his *prochein amy*(r); but he may have a writ out of Chancery to remove him, or (which is more usual) he may make an application to the court for that purpose(s). If the guardian or *prochein amy* be removed pending the suit, an entry thereof, it seems, should be made upon the roll(t).

Change of by
Defendant.

If the defendant wish to know the place of residence of the *prochein amy* or guardian, he may oblige the plaintiff to give him notice of it, by application to the court, or to a judge at chambers, for that purpose(u); and if the *prochein amy* or guardian be not a responsible person, the court would probably order the appointment of some other in his stead(r), and this was ordered in a late case before a judge at chambers; but they will not make the infant give security for costs on that account(x).

Declaration
and subse-
quent Pro-
ceedings.

Declaration and subsequent Proceedings.] In the commencement of the declaration it is stated that the plaintiff is an infant, and that he sues by A. B., who is admitted by the court to prosecute for him as his next friend, &c.(y). If it do not state that the *prochein amy* is admitted by the court, it is error(z); but, if it be stated in the declaration, the want of an entry of it on the roll will not be error(a); and the court, if in fact there be such an admission, will allow it to be en-

(l) See the form, Chit. Forms, 526.

(m) See form of rule, Chit. Forms, 526.

(n) *Archer v. Frowde*, 1 Str. 305.

(o) See form of admission, Chit. Forms, 527.

(p) See form, Chit. Forms, 526.

(q) Id. 527.

(r) *F. N.*, B. 63 K.(s) Id.: *Goodwin v. Moore*, Cro. Car. 161.(t) *Davies v. Locket*, 4 Taunt. 765.(u) *Tomlin v. Brookes*, 1 Wils. 246.(v) See *Turner v. Turner*, 2 Str. 708.(x) *Yarworth v. Mitchell*, 2 D. & R. 423; *Anon.*, 1 Marsh. 4; *Anon.*, 2 Chit. Rep. 359.

(y) See the form, Chit. Forms, 527.

(z) *Combers v. Watton*, 1 Lev. 224: see *Bird v. Pegg*, 5 B. & Ald. 418.(a) 1 Co. 53 b; Id. 54 a: *Swift v. Nott*, 1 Sid. 173.

tered on the record at any time (*b*). The declaration in other respects is the same, and is delivered or filed as in ordinary cases. *A copy of the rule of admission is delivered with it as above directed*; for, until the rule be served, the defendant is not compellable to plead (*c*).

By the 11 *G.* 4 & 1 *W.* 4, c. 47, s. 10, the parol can no longer, as formerly, *demur* in actions by or against infants (*d*). Parol cannot demur.

The guardian (*e*), or *prochein amy* (*f*), cannot be a witness. And it has been held, in an action for slander, by an infant suing by guardian, that declarations made by the guardian on the subject are not admissible in evidence against the defendant (*g*). Evidence of Guardian, &c.

The other proceedings in the cause are the same as in ordinary cases. Other Proceedings.

Security for Costs.] In ejectment, if the lessor of plaintiff be an infant, the defendant, after pleading, may move to stay proceedings, until a guardian be appointed for the infant, in order to answer costs (*i*), provided the plaintiff be not a real and substantial person (*k*). But in other actions an infant plaintiff cannot be compelled to give security for costs, even though the *prochein amy* is sworn to be insolvent (*l*). Where, however, an infant sued by guardian, the court required such security to be given, or that his appointment should be revoked, it being sworn that he was in insolvent circumstances (*m*). Security for Costs.

Costs.] If the defendant be entitled to costs, he may proceed for them by attachment against the *prochein amy* or guardian (*n*); or, it seems, he may sue out execution, even a *ca. sa.*, against the infant himself, whether he have sued by *prochein amy* (*o*) or not (*p*); though it seems otherwise if he sue by guardian (*q*). Costs.

The *prochein amy*, or guardian, who appears to be such on record, is *prima facie* liable to the payment of the attorney's bill, though he did not interfere in the conduct of the action, nor was in any way interested in the event (*r*).

(*b*) *Young v. Young*, Cro. Car. 86; *Young v. Young*, Hutton, 92; *Combers v. Watton*, 1 Lev. 224.

(*c*) 2 Sellon, 66.

(*d*) Ante, 885.

(*e*) *Clutterbuck v. Lord Huntingtower*, 1 Str. 506.

(*f*) *Hopkins v. Neal*, 2 Id. 1026.

(*g*) *Cowling v. Ely*, 2 Stark. 366.

(*h*) *Noke v. Windham*, 1 Str. 694; *Throgmorton v. Smith*, 2 Id. 932; *Thrustout v. Percival*, Barnes, 193; and see *Maidon d. Baker v. White*, 2 T. R. 159. See a form, Chit. Forms, 376.

(*k*) *Anon.*, 1 Cowp. 128. Where the infant lessor was a pauper, the court discharged a rule calling on him to find security on the terms that the infant's

father should be substituted for the nominal plaintiff. (*Doe Roberts v. Roberts*, 6 Dowl. 556).

(*l*) *Anon.*, 1 Marsh, 4c; *Yarworth v. Mitchell*, 2 D. & R. 423.

(*m*) *Mann v. Burthen*, 4 Moo. & P. 215.

(*n*) *James v. Hatfield*, 1 Str. 548; *Slaughter v. Talbot*, Barnes, 128; Ca. Pr., C. B. 32.

(*o*) *Gardiner v. Holt*, 2 Str. 1217; *Dow v. Clark*, 1 C. & M. 860; 2 Dowl. 302; S. C.

(*p*) *Finlay v. Jowle*, 13 East, 6.

(*q*) *Graves v. Graves*, Cro. Eliz. 33;

Turner v. Turner, 2 P. Wms. 296; 1 Str. 708, S. C.

(*r*) *Murnell v. Pickmore*, 2 Esp. 473.

SECT. 2.

Actions against Infants.

BOOK III.
PART II.

Process, &c.

Process, &c.] THE process against an infant is the same as in ordinary cases. An infant should not be holden to bail for any debt or other matter, where the plea of infancy would be a legal bar to the action. If holden to bail, however, the court or a judge, it should seem, would not discharge him on entering a common appearance, but would put him to plead his infancy(*s*).

Outlawry of.

An infant may be outlawed, if above the age of twelve years(*t*): or even under that age, if a female.

The Declaration.

The Declaration.] The declaration is the same, and is filed or delivered in the same manner as in other cases.

The Appearance.
By Guardian.

The Appearance.] An infant, even when sued *en autre droit*(*u*), can appear and defend by guardian only, and not in person or by attorney(*x*). If he appear by attorney, excepting in ejectment(*y*), and judgment be given against him, it is error(*z*); and the same where several defendants appear by attorney, and one of them is an infant(*a*), even although they be sued as executors(*b*). But where judgment is given for the infant, it cannot be reversed for error on the ground of his having appeared by attorney(*c*). If an attorney have undertaken to appear for an infant, he must appear for him by guardian(*d*).

Guardian,
how appointed.

The guardian (usually his father(*e*), or else some friend of the infant, willing to defend the action for him) is appointed in the same manner as is mentioned in the last section(*f*). (*As to the removal of the guardian, see ante*, 690). The admission, if special, will only authorize the defence of the particular action specified in it(*g*).

Setting aside
Appearance
by Attorney,
&c.

If the defendant appear by attorney, the court or a judge will order the appearance to be set aside as irregular, and that the defendant appear by guardian(*h*). And this, it seems, may be done at any time before judgment(*i*). Before making

(*s*) *Madox v. Eden*, 1 B. & P. 480: Vol. L 473.

(*t*) Co. Lit. 128. a.

(*u*) See *Hindmarsh v. Chandler*, 7 Taunt. 488; 1 Moore, 250, S. C.

(*x*) Co. Lit. 135. b.: *Frescobaldi v. Kynaston*, 2 Str. 784.

(*y*) *Goodright v. Wright*, 1 Str. 33.

(*z*) Vol. I. 350: 1 Ro. Abr. 287, pl. 1, 2; 747, pl. 13: 8 Co. 58 b: 9 Co. 30 b: *Beven v. Cheshire*, 3 Dowl. 70.

(*a*) *Bird v. Orms*, Cro. Jac. 289: *King v. Marborough*, Id. 303: 1 Ro. Abr. 776, pl. 9: *Coux v. Lowther*, 1 L. Raym. 600.

(*b*) *Frescobaldi v. Kynaston*, 2 Str. 783.

(*c*) *Bird v. Pegg*, 5 B. & Ald. 418: see Lil. Ent. 555, &c.

(*d*) See Vol. I. 49: *Power v. Jones*, 1

Str. 445: *Stratton v. Burgis*, Id. 114.

(*e*) See *ante*, 889, n. (*k*): *Claridge v. Crawford*, 1 D. & R. 13.

(*f*) See the form of the petition, Chit. Forms, 526; and of the guardian's consent thereto, Id. 527; of the affidavit of signing the same, Id.; of the judge's fiat and rule, Id.

(*g*) R. H., 2 W. 4, r. 2, *ante*, 890.

(*h*) *Hindmarsh v. Chandler*, 7 Taunt. 488; 1 Moore, 250, S. C.: *Gladman v. Bateman*, Barnes, 418: and see *Boys v. Edmeads*, 2 Chit. Rep. 22: *Paget v. Thompson*, 3 Bing. 609; 11 Moore, 504, S. C.: *Beven v. Cheshire*, 3 Dowl. 7.

(*i*) See *Nunn v. Curtis*, 4 Dowl. 729; 1 T. & G. 500, S. C.: *Shyman v. Stevens*, 2 Wils. 50: *Kerry v. Cade*, Barnes, 413.

the application, however, the plaintiff had better request the defendant to name a guardian and appear by him (*k*).

CHAP. VII.
SECT. 2.

Appearance,
how entered
by Plaintiff

A common appearance cannot be entered for the defendant by the plaintiff (*l*); and therefore, when the defendant neglects to enter an appearance, a judge, upon application and without summons, will make an order, "that unless the infant appear within six days after personal service of the order, the plaintiff may assign John Doe for his guardian, and enter a common appearance for the defendant;" and upon affidavit of the service of this order, and shewing the original, the judge will make the order absolute. An admission is then drawn up, &c., and a common appearance entered as in ordinary cases (*m*).

The Plea and subsequent Proceedings.] If the defendant intends availing himself of his infancy as a defence, he must now plead it specially in bar (*n*). We have now seen, (*ante*, 384), that by the 11 *G. 4* & 1 *H. 4*, c. 47, s. 10, in an action by or against an infant on the bond of his ancestor, he can no longer, as formerly, pray that the parol may demur until he shall be of age. Even before this statute, if judgment were given that the parol demur, and error were brought on that judgment, the defendant could not plead his nonage in the court of error, and again pray the parol to demur (*o*). In an action against several persons, the defence of infancy, being personal, should be pleaded separately (*p*). Infancy may be pleaded with *non assumpsit* or *namquam indebitatus*, or, generally speaking, with any other plea (*q*). After setting aside a regular judgment, the court have allowed defendant to plead infancy (*r*). The plea requires counsel's signature (*s*). It is within the rule of *T. T.*, 1 *W. 4*, *ante*, Vol. I. 178, as to rules to plead double. Before you deliver the plea, annex a copy of the rule for the admission (or, in the Common Pleas, a copy of the admission) of the guardian to it (*t*).

The Plea and
subsequent
Proceedings.

The payment of money into court with a plea of infancy is not an admission of the plaintiff's right of action beyond the sum paid in (*u*).

Payment into
Court by.

Where the plaintiff declares on a joint contract against two defendants, and one of them pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him and proceed against the other defendant in that action, but must commence a fresh action against the adult only (*v*). Where the defendant in *assumpsit* pleads infancy to a declaration, consisting of several

Replication,
&c., where
Defendant is
an Infant.

(*k*) *Shipman v. Stevens*, 2 Wils. 50.

(*l*) Tidd, 9th ed. 99: *Roberts v. Spurr*, 3 Dowl. 555; and in *Nunn v. Curtis*, 4 Dowl. 729, where the plaintiff entered an appearance for an infant defendant, the court set it and all subsequent proceedings aside, even after a writ of inquiry had been executed and final judgment signed, but without costs. The infant, instead of making a summary application for that purpose, might bring a writ of error.

(*m*) 2 Sellon, 68; see *Stone v. Attwoll*, 2 Str. 1076, 2 Saund. 117 f: *Gladman v. Bateman*, Barnes, 418.

(*n*) *Ante*, Vol. I. 185, &c.

(*o*) *Aland v. Mason*, 2 Str. 861.

(*p*) 1 Chit. Pl. 598, 5th ed. See in ejectment after error brought, *Goodright v. Wright*, 1 Str. 33: but see *contra*, in other actions, *Power v. Jones*, 1 Str. 445.

(*q*) See Tidd, 9th ed. 656.

(*r*) *Delafield v. Tanner*, 5 Taunt. 856; 1 Marsh. 391, S. C.

(*s*) Vol. I. 171.

(*t*) See the form of the plea, Chit. Forms, 41.

(*u*) *Hitchcock v. Tyson*, 2 Esp. 482, n.: *post*, Book IV. Part I. Ch. 9.

(*v*) *Chandler v. Parkes*, 3 Esp. 76; *Jaffray v. Frebain*, 5 Id. 47; *Noke v. Ingham*, 1 Wils. 89.

BOOK III.
PART II.

counts or demands, the plaintiff may reply as to part of his demand, that it was for necessities; to other part, that the defendant was at full age at the time of the contract; and to the other part, that he confirmed it after he came of age.

The other proceedings are the same as in ordinary cases.

Warrant of
Attorney and
Cognovit.

Warrant of Attorney and Cognovit.] An infant cannot bind himself by a warrant of attorney or *cognovit*(y). And if a warrant of attorney or *cognovit* be obtained from one, the court, or perhaps a judge at chambers, will order it to be given up and cancelled, or judgment thereon to be set aside (*ante*, 681, 690).

Costs.

Costs.] An infant defendant is liable for costs, although a guardian have been appointed(z). As to the guardian's liability to the attorney for costs, see *ante*, 891.

Execution.

Execution.] The infant may be arrested on a *ca. sa.*(a). The execution in this and other respects is the same as in ordinary cases. The Court of Common Pleas refused to discharge an infant in an action of slander from execution for damages and costs, although the Insolvent Court had refused to relieve him, because, on account of his infancy, he was unable to make an assignment of property required by 7 G. 4, c. 57 (b).

Error.

Error.] Upon error brought by or against an infant, he should have a *prochein amy* or guardian appointed, as above directed.

(y) *Oliver v. Woodroffe*, 7 Dowl. 176.

(a) Vol. I. 448.

(z) *Anderson v. Warde*, Dyer, 104; *Gardiner v. Holt*, 2 Str. 1217; *Dow v. Clark*, 1 C. & M. 860; 2 Dowl. 302, S. C.

(b) *Defries v. Davis*, 3 Dowl. 629; 1 Hodges, 103; 1 Scott, 594; 1 Bing. N. C. 692, S. C.

CHAPTER VIII.

ACTIONS BY AND AGAINST HUSBAND AND WIFE.

SECT. 1.

*Actions by Husband and Wife.*CHAP. VIII.
SECT. I.When to sue
jointly or not.

THERE are but few peculiarities in actions by husband and wife, and these have been already incidentally noticed in the course of the Work. In general, wherever the cause of action would survive to the wife, she and her husband ought to be joined in the action(*a*). Where, however, the cause of action arises during coverture, the husband is frequently allowed to bring the action in his own name, or in the joint names of himself and his wife(*a*). If a wife sue alone, the defendant may plead the coverture in abatement; or the coverture may be assigned by the husband for error upon a writ of error *coram nobis*(*b*). And if she marry after writ, and before plea, her coverture must be pleaded in abatement(*c*). If she marry after plea, the coverture should be pleaded *puis darrein continuance*(*d*). If she sue alone, without having any legal interest whatever, she would be nonsuited(*e*). If she sue jointly with her husband, when she ought not to have done so, the defendant may demur(*f*), or arrest the judgment(*g*), or bring error(*h*), if the defect appear on the pleadings, or, it should seem, nonsuit the plaintiffs at the trial if it do not. If the husband sue alone, when the wife ought to be joined, the defendant may demur, move in arrest of judgment, or bring error if the defect appear on the pleadings(*i*), or plead the defence specially, if it does not(*k*). In a late case where the plaintiff declared for an injury to his reversionary interest, and it appeared that he held the premises under a lease made to himself and wife, and had underlet them, it was objected that the wife ought to have joined in the action; but the Court of Exchequer held that there was no ground for the objection, and that even were it valid, it should have been taken by plea in abatement(*l*).

(*a*) *Dunstan v. Burwell*, 1 Wils. 224; *Swithen v. Vincent*, 2 Id. 227; 1 Chit. Pl. 6th ed. 28, 72. See form of affidavit to hold to bail by *feme*, in an action brought by *baron* and *feme*, Chit. Forms, 210.

(*b*) *Milner v. Milnes*, 3 T. R. 631: *ante*, Vol. I. 392.

(*c*) *Morgan v. Painter*, 6 T. R. 265: 1 Chit. Pl. 6th ed. 33: see *Hollis v. Freer*, 2 Bing. N. C. 719.

(*d*) *Tidd*, 9th ed. 849.

(*e*) *Candell v. Shaw*, 4 T. R. 361; 1

Chit. Pl. 6th ed. 33.

(*f*) *Buckley v. Collier*, 1 Salk. 114: *Rose v. Bowler*, 1 H. Bl. 108.

(*g*) *Abbott v. Blofield*, Cro. Jac. 644.

(*h*) *Bidgood v. Way*, 2 Bl. Rep. 1236.

(*i*) *Alebury v. Walby*, 1 Str. 229: *Abbott v. Blofield*, Cro. Jac. 644.

(*k*) *Ante*, Vol. I. 185, 186: *Anon.*, 1 Salk. 282: *Rumsey v. George*, 1 M. & Sel. 280.

(*l*) *Wallis v. Harrison*, 7 Dowl. 595.

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Where the plaintiff had hired a house of the defendant, representing herself at the time to be a *feme covert*, and upon the faith of the like representation had obtained goods from various tradesmen, the court held that her assertion, that she was a *feme covert*, estopped her from suing as a *feme sole*, in respect of a trespass committed by the defendant, under colour of a distress for rent(*m*).

Setting aside
Release by
Husband.

Where a wife, living apart from her husband under a deed of separation, brought an action as executrix in the joint names of her husband and herself, and the husband released the debt; the defendant having pleaded this release *puis darrein continuance*, the court ordered the plea to be taken off the record, and the release to be given up to be cancelled(*n*).

Judgment.

Suing in Husband's Name.

The proceedings to judgment are the same as in other cases. As to staying proceedings where the action is brought in the husband's name without authority, see *post*, Book IV. Part I. Ch. 10.

Sci. fa., Warrant of Attorney, &c.

As to *scire facias* upon the death of a *feme covert* plaintiff, or upon the marriage of *feme sole* plaintiff, see *ante*, 824, and *post*, Book IV. Part I. Ch. 33; and as to warrants of attorney given to a *feme sole*, who marries before judgment, see *ante*, 691.

Execution.

The execution against the defendant is the same as in ordinary cases. As to the execution against husband and wife, see *post*, 897.



SECT. 2.

Actions against Husband and Wife.

Where to be
sued jointly
or not.

In bringing actions against husband and wife, the general rule is, that, whenever the cause of action would survive against the wife, they ought to be sued jointly(*o*). Care should be taken not to bring an action against the wife without making the husband also a party, otherwise she may plead her coverture in abatement or bar, according to circumstances; or the coverture may be assigned by the husband for error(*p*), upon a writ of error *coram nobis* or *vobis*(*q*). This is the only course to be adopted where the wife is sued alone(*r*). But if the action be brought against her on her supposed contract during coverture, she may plead the coverture in bar(*s*). If the action be brought against a woman while sole, and she marry pending the suit, the suit will not be abated, and the plaintiff may proceed to execution without noticing the husband(*t*). If the husband be improperly sued alone, or the husband and wife be improperly joined, the defendant may, if the defect appear on the pleadings, demur,

(*m*) *Langford v. Foot*, 2 Moo. & Scott, 349; and see *Mace v. Caddell*, Cowp. 232.

(*n*) *Innell v. Newman*, 4 B. & Ald. 419.

(*o*) *Dunstan v. Burwell*, 1 Wils. 224; *Swithen v. Vincent*, 2 Id. 227; 1 Chit. Pl. 6th ed. 57.

(*p*) See forms, Chit. Forms, 146.

(*q*) See Vol. I. 392.

(*r*) *Milner v. Milnes*, 3 T. R. 631.

(*s*) *Ante*, Vol. I. 185: *James v. Fowkes*, 12 Mod. 101; *Linch v. Hooke*, 1 Salk. 7; 1 Chit. Pl. 6th ed. 59.

(*t*) *King v. Jones*, 2 Str. 811; *Cooper v. Hunchin*, 4 East, 521; *post*, 897.

move in arrest of judgment, or bring error(*u*); if it do not so appear, he may plead the matter specially.

CHAP. VIII.
SECT. 2.

Process, &c.] In what cases a wife may be arrested upon process against her solely, or against her and her husband jointly, see *Vol. I.* 471. In an action against husband and wife, when the husband alone has been arrested, special bail may justify for him only, on his entering a common appearance for his wife(*r*). Where husband and wife were arrested, and the wife discharged out of custody upon entering a common appearance, and the plaintiff then declared against the husband alone, it was holden irregular(*q*). As to the service of non-bailable process upon husband and wife, see *Vol. I.* 115. In an action against the husband and wife, the husband may be outlawed and the wife waived(*z*). An attachment for non-payment of costs will not be granted against the wife, though both are parties to the suit(*a*).

Process, &c.

Appearance, &c.] If a *feme covert* be sued alone, she must appear in person; for she cannot appoint an attorney(*b*). But if the husband and wife be sued jointly, they may appear by attorney; for the husband is capable of appointing an attorney for both(*c*).

Appearance,
&c.

The other proceedings to judgment are the same as in ordinary cases.

Execution.] As to the cases in which property belonging to the wife may or may not be taken in execution for the debt of the husband, see *Vol. I.* 430.

Execution.

If a *ca. sa.* be sued out against husband and wife, the wife may be taken on it, and the court will not discharge her(*d*); unless where she has no separate property out of which the demand can be satisfied(*e*), or there appears to be collusion between the husband and the plaintiff to keep her in custody(*f*); the general rule being, that the wife shall be discharged, if in custody, before execution, but not after it(*g*). Also, if the husband die before execution, and the action survive against the wife, she may be taken in execution, in the same manner as if the action were originally brought against her alone as a *feme sole*(*h*). Where a woman who was married at the time the action was brought was sued as a *feme sole*, and taken on a *ca. sa.*, the court refused to relieve her on motion, and left her to her remedy by writ of error(*i*).

Where Wife
may be taken
on *Ca. Sa.*
against Both.

If an action be brought against a *feme sole*, and pending it she marry, it seems she may be taken on a *ca. sa.*, and the

Where *feme*
Defendant

(*u*) *Mitchinson v. Hewson*, 7 T. R. 348.

(*x*) *Coulson v. Scott*, 1 Chit. Rep. 75.

(*y*) *Cattarns v. Player*, 3 D. & R. 247. See Vol. I. 514.

(*z*) See Tidd's Supplement, 63, and practice there stated, citing *Smith v. Ashe*, Cro Car. 58: Bac. Abr., Outlawry, C. 3.

(*a*) *Doe Allanson v. Caufield & Wife*, 6 Dowl. 523.

(*b*) Co. Lit. 135: *Oulds v. Sanson*, 3 Taunt. 261.

(*c*) 2 Saund. 213: Vol. I. 49.

(*d*) *Roberts v. Andrews*, 3 Wils. 124; 2 W. Bl. 720, S. C.: *Finch v. Duddin*, 2 Str.

1237: *Langstaff v. Rain*, 1 Wils. 149: *Berriman v. Gilman*, Barnes, 203: *ante*, Vol. I. 448.

(*e*) *Hoad v. Matthews*, 2 Dowl. 149: *Evans v. Chester*, 2 M. & W. 847.

(*f*) *Sparkes v. Bell*, 8 B. & C. 1; 2 M. & R. 124, S. C.: *Pitts v. Meller*, 2 Str. 1167: Tidd, 9th ed.: *ante*, Vol. I. 448.

(*g*) *Roberts v. Andrews*, 3 Wils. 124; 2 W. Bl. 720, S. C.

(*h*) 1 Ro. Abr. 890: 2 Bac. Abr., Execution, G. 4.

(*i*) *Moses v. Richardson*, 8 B. & C. 421.

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PART II.marries pend-
ing Action.

court will not discharge her, unless perhaps where she has no separate property (*j*). The more regular mode of proceeding, however, in such a case is, to sue out a *scire facias*, in order to make the husband a party, and then to issue execution against both (*k*). Moreover, on a *fieri facias* against the wife who married pending the action, it is irregular to take the goods of the husband (*l*).

Other Pro-
ceedings.

Other Proceedings.] As to a writ of error by *feme covert*, see *Vol. I.* 348, 350; and as to the abatement of a writ of error, by the marriage of a *feme sole*, plaintiff or defendant, see *Vol. I.* 355. As to *scire facias* upon the marriage of a *feme sole* defendant, see *ante*, 824; *post*, *Book IV. Part I. Ch.* 33. And as to warrants of attorney by a *feme covert*, or by a *feme sole* who marries before judgment, see *ante*, 691.

(*j*) *Evans v. Chester*, 2 M. & W. 847; 6 Dowl. 140, S. C.: *Doyley v. White*, Cro. Jac. 323; *Cooper v. Hunchin*, 4 East, 521; *King v. Jones*, 2 Str. 811.

(*k*) In *Evans v. Chester*, 2 M. & W. 847, 6 Dowl. 140, S. C., *Parke, B.*, is reported to have intimated, that the husband may bring a writ of error on a judgment obtained under such circumstances against the wife.—It is submitted, however, that this observation of the learned baron applies only to cases where the defendant was married at the time of commencing the action, and not to cases where she marries pending the action; for, in the

latter class of cases, the only way in which the plaintiff can have execution against the husband seems to be by proceeding to judgment against the wife, and then suing out a *sci. fa. quare executionem non*, against the husband and wife (*ante*, 824); but if the judgment be erroneous, he may be defeated of execution against either, by the voluntary act of the defendant in marrying pending the suit, which would be manifestly unjust. (See *per Curiam, King v. Jones*, 2 Str. 811: and see 2 Saund. 72).

(*l*) *Doe Taggart v. Butcher*, 3 M. & Sel. 557, 559.

CHAPTER IX.

ACTIONS BY AND AGAINST BANKRUPTS OR THEIR ASSIGNEES.

SECT. 1.

Actions by Bankrupts or their Assignees.

<i>In whose Name to be brought,</i>	<i>Declaration and subsequent Pro-</i>
899.	<i>ceedings,</i> 901.
<i>Process, &c.</i> 900.	<i>Costs, &c.,</i> 902.

CHAP. IX.
SECT. 1.

In whose Name to be brought.] FOR any debt due to the bankrupt, and for injuries to his property, previous to his bankruptcy (*m*), the action must, of course, be commenced in the names of his assignees, that is, in the case of a town fiat the official assignee and the assignee chosen by the creditors, or the latter in the case of a county fiat. But if the bankrupt at the time of his bankruptcy had no beneficial interest in the contract or property injured,—as, if he had assigned all his interest in the contract or property to a third person,—then the action should be in the bankrupt's name (*n*). The consent of the creditors is not necessary to enable the assignees to bring such action (*o*). All the assignees should sue, otherwise the defendant may plead in abatement, or perhaps nonsuit the plaintiff (*p*) in actions *ex contractu*, though in actions *ex delicto* he could plead in abatement only (*q*). When one of several partners becomes bankrupt, the action must be in the name of the solvent partner and the assignees of the bankrupt (*r*); and, upon petition, the assignees may be authorized to use the name of the solvent partner without his consent, provided such partner, if no benefit be claimed by him by virtue of the proceedings, be indemnified against costs; and upon petition it may be ordered that he shall receive his share of the proceeds of the action (*s*). Before assignees have been appointed by the creditors, it should seem the official assignee may sue (*t*). When a new appointment of assignees has been ordered, the new assignees are to sue (*u*). When an assignee

In whose
Name to be
brought.

(*m*) See *Hancock v. Caffin*, 8 Bing. 358; 1 Moo. & Scott, 521, S.C.; *Wright v. Fairfield*, 3 B. & Ad. 727; Arch. Bkt. L. 253.

(*n*) *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40; *Dangerfield v. Thomas*, 1 Per. & D. 287; see *Mogg v. Baker*, 3 M. & W. 195; *Tibbits v. George*, 6 Nev. & M. 804.

(*o*) *Bozon v. Williams*, 2 Y. & J. 475.
(*p*) *Snellgrove v. Hunt*, 2 Stark. 424; 1 Chit. Rep. 71, S. C.; *Aldritt v. Kittridge*, 6 Moore, 569; Arch. Bkt. L. 256.

(*q*) 1 Chit. PL 6th ed. 66; Arch. Bkt. L. 256.

(*r*) *Thomason v. Frere*, 10 East, 418; *Eckhardt v. Wilson*, 8 T. R. 140; *Anon.*, 12 Mod. 446.

(*s*) See 6 G. 4, c. 16, s. 89.

(*t*) See *Page v. Baner*, 4 B. & Ald. 345.

(*u*) 6 G. 4, c. 16, s. 66. See *Bloxam v. Hubbard*, 5 East, 407; 6 Moore, 569; *Snellgrove v. Hunt*, 1 Chit. Rep. 71; *De Cosson v. Vaughan*, 10 East, 61.

BOOK III.
PART II.

dies, or a new assignee is chosen, the action will not be thereby abated; but the court may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and the action may be prosecuted in the name of the said surviving or new assignee, in the same manner as if he had originally commenced it (*x*). Where an action has been commenced by a party who afterwards becomes bankrupt, the defendant may defeat the action by pleading specially the bankruptcy, fiat, and assignee's appointment, and the assignees may be compelled to proceed *de novo* in their own names (*y*). If they are thus allowed to continue the action already brought, they must proceed in the bankrupt's name to judgment; when, and not before, they can make themselves parties to the record, by *scire facias*, as mentioned *ante*, 825. So, if error be brought by or against a trader who afterwards becomes bankrupt pending the writ, the assignees must proceed in his name to judgment (*z*). The assignees, however, should sue out a *scire facias* to revive the judgment, and make themselves parties to the record, before they issue execution (*a*). Where the assignees thus continue the suit, they may be compelled to give security for all the costs (*b*); and in a recent case, where the assignees refused to interfere, and the defendant obtained a rule for judgment as in case of a nonsuit, the court refused to discharge it on a peremptory undertaking, unless the plaintiff also gave security for costs (*c*). Where, to an action of debt on an Irish judgment, the defendant pleaded that the judgment was entered up on a warrant of attorney given to the plaintiff to secure payment on a bond; that, after the bond and warrant of attorney were given, and before the judgment was entered up, the plaintiff became bankrupt, and the debt in question was vested in his assignee, who had brought an action on the judgment before that commenced by the plaintiff, and that the same was still depending; it was held that the plaintiff was the person by whom the judgment ought to have been entered up, though after his bankruptcy; that, in so doing, and in bringing the action, he might be considered as a trustee for the creditors; and the pendency of the other action, as here pleaded, was no defence (*d*).

Process, &c.

Process, &c.] The process, &c., is the same as in ordinary cases. It need not, at least in the Queen's Bench, or Exchequer, describe the plaintiffs as assignees (*e*). As to the affida-

(*x*) Where the assignee of a bankrupt estate has died, and another assignee has been appointed in his stead, the rule to enter a suggestion of such death upon the record is absolute in the first instance; (*Westall v. Sturgess*, 4 Moo. & P. 217); and when he has entered the suggestion on the record, he may recover a penalty as well as his predecessor. *Per Tindal, C. J.*: "Nothing can be more clear or comprehensive than the language of this section; it conveys every right to the new assignee, for he is to sue in the same manner as if he had originally commenced the action." (*Bates v. Sturges*, 7 Bing. 585; 5 Moo. & P. 568, S. C.)

(*y*) *Biggs v. Cox*, 4 B. & C. 920; 7 D. &

R. 409, S. C.: *Kinnear v. Tarrant*, 15 East, 622. In the second edition of this work, a MS. case of *Smith v. Hirst*, (T. T. 1821), is cited as having decided generally, that, if the action be already commenced by the bankrupt before his bankruptcy, the assignees in that case may either proceed in that action, or commence a new one; but this, as a general position, is, according to the above cases, incorrect.

(*z*) *Ante*, Vol. I. 355.

(*a*) *Ante*, 826, 827. See the form, Chit. Forms, 495

(*b*) See *post*, Book IV. Part I. Ch. 12.

(*c*) *Taylor v. Montague*, 2 M. & W. 315.

(*d*) *Guinness v. Carroll*, 1 B. & Ad. 459.

(*e*) *Ante*, Vol. I. 106, 513.

vit to hold to bail by assignees of a bankrupt, see *Vol. I.* 487 (f).

CHAP. 1X.
SECT. 1.

Declaration, and subsequent Proceedings.] The declaration and other pleadings in the cause are filed or delivered as in ordinary cases (g).

Declaration and subsequent Proceedings.

By *R. H.*, 4 *W.* 4, r. 21, *ante*, 875, if the plaintiffs sue as assignees, and defendant intends disputing their being such, he must plead the defence specially. A plea, denying that the plaintiffs are assignees of the estate and effects of the bankrupt, puts in issue not merely the plaintiffs' appointment as assignees, but also the petitioning creditor's debt, act of bankruptcy, &c. (h).

What must be pleaded specially.

In actions by assignees, no proof shall be required at the trial of the petitioning creditor's debt, and of the trading and act of bankruptcy, unless the defendant, "at or before pleading," shall give notice to such assignee that he intends to dispute some and which of such matters (i). This notice must be given notwithstanding defendant pleads a plea expressly disputing the bankruptcy, &c. (k). It must specify which of the three matters, trading, petitioning creditor's debt, and act of bankruptcy, is intended to be disputed. Notice to dispute "the bankruptcy" is too general (l). The notice does not require personal service. Serving it on the attorney of the assignees is sufficient; but a delivery of it to a maid-servant at the house of the assignee is not (m). It has, however, been held sufficient that the notice was served on the clerk of the assignee at his counting-house (n). It must be served either at the time of pleading, or before it; if he plead without giving the notice, he cannot afterwards, even before his time for pleading has expired, again plead with notice, until he have first obtained leave to withdraw his former plea (o). And where the clerk of the defendant's attorney delivered a plea of the general issue, but without notice to dispute the bankruptcy, and on the same day obtained back the plea under the pretence of correcting a mistake, and delivered another plea with the notice attached, it was held insufficient; the defendant ought to have moved to withdraw his plea (p). The court sitting at *Nisi Prius* will not, it seems, enter into the question, whether the plaintiff's attorney has or has not undertaken to accept of notice after plea pleaded, if the fact is disputed (q). It is not considered as a part of defendant's case at a trial, but he may prove the service of it, as soon as the assignees attempt to make out a *prima facie* case, by producing the fiat, &c. (r). If the notice be of an intention to dispute the act of bankruptcy only, and depositions are read to prove the trading and petitioning creditor's

Notice of disputing Bankruptcy, &c.

(f) See the form, Chit. Forms, 210.

(g) See Arch. Bkt. L. 257. See the form, Chit. Forms, 529.

(h) *Butter v. Hobson*, 4 Bing. N. C. 290; *Buckton v. Frost*, 1 Per. & D. 102.

(i) 6 G. 4, c. 16, s. 90. See the form, Chit. Forms, 529.

(k) *Moon v. Raphael*, 7 C. & P. 115.

(l) *Trimley v. Unwin*, 6 B. & C. 537.

(m) *Howard v. Ramsbottom*, 3 Taunt. 526.

(n) *Widger v. Browning*, 2 C. & P. 523;

1 M. & M. 27, S. C.

(o) *Poole v. Bell*, 1 Stark. 328; *Radmore v. Gould*, 1 Wightwick, 80; *Gardner v. Slack*, 6 Moore, 489.

(p) *Lawrence v. Crowder*, 3 C. & P. 229; 1 Moo. & P. 511, S. C.; and see *Poole v. Bell*, 1 Stark. 328; 6 B. & C. 537, n. post, 903.

(q) *Folkes v. Scudder*, 3 C. & P. 232.

(r) *De Charme v. Waine*, 2 Camp. 324.

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debt, this does not put the whole file of proceedings in evidence; but if the opposite party wish to inspect other depositions, or have them read, he must call for them, as part of his case (s).

Payment into
Court where
Commission
is disputed.

Where a separate commission of bankrupt was sued out, before the 1 & 2 W. 4, c. 57, came into operation, against A., and a joint commission against A. and B.; and the assignees of A. brought an action against C., and recovered: the court ordered the money to be paid into court, until a petition then pending before the Lord Chancellor, to supersede the separate commission, should be decided (t).

Costs, &c.

Costs, &c.] The costs are the same as in ordinary cases (u), excepting that by 6 G. 4, c. 16, s. 90, if the notice above mentioned be served, and the matter so disputed be proved or admitted at the trial, the judge may, if he see fit, grant a certificate thereof; and the assignee shall thereupon be entitled to such costs (to be taxed) as were occasioned by such notice, to be added to his own costs if he succeed, or to be deducted from the costs, &c., of the other party, should he obtain a verdict (v). If a cause be referred by order of *Nisi Prius*, the judge or court cannot certify under this statute (x). As to double costs, see *post*, 906.

Judgment,
&c.

Judgment, &c.] The judgment and execution are the same as in ordinary cases.

SECT. 2.

Actions against Bankrupts or their Assignees.

<i>Assignees, when liable and how sued</i> , 902.	<i>continuance of Action</i> , 903.
<i>Process</i> , 903.	<i>Staying Proceedings</i> , 905.
<i>The Declaration, id.</i>	<i>Costs</i> , 906.
<i>The Plea, id.</i>	<i>The Judgment, id.</i>
<i>Proof of Debt, how far a discon-</i>	<i>Execution, &c., id.</i>
	<i>Other Points as to</i> , 907.

Assignees,
when liable
and how sued.

Assignees, when liable and how sued.] ASSIGNEES cannot be sued as such at law; but they may be sued in their individual capacity for any cause of action arising to others from their acts, which they cannot justify under the fiat and their appointment. They cannot, however, be sued by action for the amount of dividends; the proper remedy is by petition (y). Where the bankrupt held his assignee to bail in an action for money had and received, instituted with a view to try the

(s) *Black v. Thorn*, 4 Camp. 191.
(t) *Hodgkinson v. Travers*, 2 D. & R. 409; 1 B. & C. 257, S. C.
(u) See Arch. Bkt. L. 270: *Andrews v. Sealey*, 8 Price, 212.
(v) See *Atkins v. Seaward*, 1 B. & B. 275; 3 Moore, 601, S. C.: *Ward v. Abrahams*, 1 B. & Ald. 367: Arch. Bkt. L. 270.
(x) *Barthrop v. Anderton*, 1 M. & Scott, 361; 8 Bing. 268, S. C.
(y) Arch. Bkt. L. 214: 6 G. 4, c. 16, s. 111.

validity of the fiat, the court discharged the assignee upon a common appearance(*z*). CHAP. IX.
SECT. 2.

Process, &c.] As to the cases in which a bankrupt can be holden to bail, and under what circumstances he is privileged from arrest, see *ante*, Vol. I. 470, 527, 528. If bail have been put in for a defendant, and he afterwards become a bankrupt, and obtain his certificate before the bail are fixed, the bail will be thereby discharged; and an *exoneretur* may be entered on the bail-piece, upon application to the court in term, or to a judge in vacation(*a*). And see, as to how far the bankruptcy of the defendant will discharge the sheriff or the bail below, *ante*, Vol. I. 568. Process, &c.

The Declaration.] The declaration is filed or delivered as in ordinary cases. The Declaration.

The Plea, &c.] The general plea of bankruptcy need not be signed by counsel(*b*); but a special plea of bankruptcy and certificate must(*c*). The Plea, &c.

If one of the several defendants plead bankruptcy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others(*d*), whether the action be upon contract or in tort; upon which *nolle prosequi* the plaintiff will be liable to the costs of that defendant(*e*). Such defendant need not have been joined in the action, if his certificate was obtained before action brought. (*See ante*, 651). Where one of several pleads Bankruptcy.

In actions against assignees, they may plead the general issue, and give the special matter in evidence(*f*). The words "by statute" should be inserted in the margin of the plea, otherwise it will have only the same effect as in ordinary cases(*g*). General Issue by Assignees.

In actions against assignees, if the plaintiff intend to dispute the petitioning creditor's debt, the trading, or act of bankruptcy, he must "*before issue joined*" give notice to the defendants of his intention to dispute some and which of such matters, otherwise no proof shall be required at the trial of the facts above mentioned(*h*). Service of this notice, at the time of delivering the issue, will not be sufficient(*i*); and the court, sitting at *Nisi Prius*, will not enter into the question, whether the defendant's attorney has or has not undertaken to accept of notice after issue joined, if the fact be disputed(*k*). Other points as to this notice have been already stated (*ante*, 901). Notice of disputing Bankruptcy, &c.

The issue is made up, and the other proceedings to judgment are the same, as in ordinary cases.

Proof of Debt how far a Discontinuance of Action, &c.] By statute 6 G. 4, c. 16, s. 59, no creditor who has brought an Proof of Debt how far a Dis-

(*z*) *Chambers v. Bernasconi*, 4 Moo. & P. 218; 6 Bing. 498, S. C.

(*a*) *Ante*, Vol. I. 620.

(*b*) Vol. I. 171.

(*c*) See Arch. Bkt. L. 281, 282.

(*d*) *Noke v. Ingham*, 1 Wils. 89.

(*e*) 3 & 4 W. 4, c. 42, s. 32.

(*f*) 6 G. 4, c. 16, s. 44: Arch. Bkt. L. 234. See *Worth v. Bubbs*, 2 B. & Ad. 177;

1 Dowl. 328, S. C.: *Carruthers v. Payne*, 5 Bing. 270; 2 Moo. & P. 429, S. C.: *Edge v. Parker*, 8 B. & C. 697.

(*g*) R. T. 1838.

(*h*) 6 G. 4, c. 16, s. 90. See the form, Chit. Forms, 529.

(*i*) *Richmond v. Heapy*, 4 Camp. 207.

(*k*) *Folks v. Seudder*, 3 C. & P. 232.

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PART II.
continuation
of Action, &c.

action against a bankrupt for a debt provable under the commission, shall prove a debt, or have any claim entered upon the proceedings under such commission, without relinquishing such action; and if the bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not so prove or claim without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by a creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed; provided that *such creditor shall not be liable to the payment to the bankrupt or his assignees, of the costs of such action* so relinquished by him; and that, where a creditor shall have brought an action against such bankrupt and another person, his relinquishing such action against the bankrupt shall not affect such action against such other person: provided also, that a creditor who has so elected to prove or claim, if the commission be afterwards superseded, may proceed in the action as if he had not so elected; and in bailable actions shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below, or perfected bail above; or, if the defendant has put in bail, or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above within the first eight days in term, after notice in the *London Gazette* of the superseding such commission, and by suing the bail upon their recognisance, if the condition is broken (*l*). There is no need of a formal discontinuance of the action before the plaintiff proves his debt, or has his claim entered on the proceedings under the fiat, for the proof or entry itself operates as a discontinuance of it (*m*). But the plaintiff, to bring himself within the act, must either so prove his debt, or have his claim so entered (*n*). And the defendant is, it seems, entitled to have a suggestion of the fact of the plaintiff having proved or made his claim entered upon the record in the action; before which the action is not legally terminated, so as to render further proceedings in it by either party irregular (*o*). If a creditor, however, who has proved his debt, were afterwards to bring an action for it, or proceed in an action already brought, although his election could not be pleaded in bar, yet the court in which such action was brought would, upon application, stay the proceedings in it, or an application might be made to the Court of Bankruptcy to expunge the proof (*p*): or if the bankrupt were in custody at the suit of the creditor, the Court of Bankruptcy, upon petition, would order him to be discharged, and probably make the creditor pay the costs (*q*). In strictness, perhaps, nothing but actual proof, or claim of the debt, ought to be deemed a relinquishment of an action already brought, or of the creditor's right to commence

(*l*) See the prior repealed act, 49 G. 3, c. 121, s. 14.

(*m*) *Adams v. Bridger*, 8 Bing. 314; 1 M. & Scott, 438, S. C.: *Ex p. Woolley*, 1 Rose, 394: *Ex p. Glover*, 1 Glyn & J. 271: *Ex p. Frith*, Id. 165.

(*n*) *Augarde v. Thompson*, 2 M. & W. 617.

(*o*) *Kemp v. Potter*, 6 Taunt. 549: Arch. Bkt. L. 110.

(*p*) *Harley v. Greenwood*, 5 B. & Ald. 95. As to bringing an action in a foreign country, see *Ex p. Cotesworth*, 1 Deac. & Chit. 281.

(*q*) Arch. Bkt. L. 110.

one(*r*); and, therefore, merely being assignee to the estate, unless the party be also a creditor, and have proved his debt, has been holden to be no election(*s*). Yet where a creditor, who had the bankrupt in custody upon mesne process, petitioned to be admitted to prove, and an order was made accordingly, the bankrupt was holden to be entitled to his discharge *instantly*, upon the making of the order(*t*); and lodging a detainer against a bankrupt in custody, and afterwards proving under the commission, will entitle the bankrupt to his discharge at the costs of the creditor(*u*). Even petitioning that the commission may be superseded, or, if found valid, that the party may be admitted to prove, or the like, will be deemed to be within the equity of the statute, so as to induce the court of bankruptcy, under circumstances, to enjoin the creditor from proceeding at law(*x*), or to make him discharge the bankrupt out of custody before the petition can be entertained(*y*). If a creditor have two debts, perfectly distinct in their nature, or due in different rights, and he prove one of them, this will not prevent him from bringing an action against the bankrupt for the recovery of the other(*z*); and although the debt, upon which the action is brought, was due and provable at the time of proving the other debt(*a*), for the statute does not apply to actions for distinct demands brought subsequently to the proof or claim(*b*). Where the plaintiff, after being nonsuited, took out a fiat against the defendant, the court refused to allow the proceedings to be stayed without costs under the above section (6 *G. 4, c. 16, s. 59*) (*c*); and *Tindal, C. J.*, said, "All that the clause in question directs is, that a creditor who has, before the issuing of the commission, brought an action against the bankrupt in respect of a debt provable under the commission, may elect to prove it, and in that case shall relinquish the suit, and shall not be liable to costs in respect thereof. That evidently points at a commission issued by a third person; and it would be extremely hard upon a party to be compelled to come in as a creditor, and prove against the estate, and also pay costs where the action is discontinued, without any default on his part. But here the suit has come to its natural end, and the plaintiff seeks to take advantage of his own voluntary act, in order to excuse himself from payment of costs. I therefore think the plaintiff has not brought himself within either the words or the intention of the statute."

[*Staying Proceedings.*] Under the 6 *G. 4, c. 16, s. 120*, which authorizes the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, Staying Proceedings.

(*r*) Arch. Bkt. L. 111.

(*s*) *Ex p. Ward*, 1 Atk. 153.

(*t*) *Ex p. Irving*, Buck, 423.

(*u*) *Ex p. Cross*, 2 Glyn & J. 100.

(*x*) *Ex p. Bozannett*, 1 Rose, 181; *Ex p. Hardinburgh*, Id. 204; and see *Ex p. Joseph*, Id. 184; *Ex p. Dickson*, Id. 93.

(*y*) See *Ex p. Blaydes*, 1 Glyn & J. 179; *Ex p. Lord*, 2 Rose, 422; Arch. Bkt. L. 111.

(*z*) *Watson v. Madox*, 1 B. & Ald. 121;

Harley v. Greenwood, 5 Id. 95; *Dally v. Wolferston*, 3 D. & R. 271; *Ex p. Botterill*, 1 Atk. 109; *Ex p. Matthews*, 3 Atk. 817.

(*a*) *Bridget v. Mills*, 12 Moore, 92.

(*b*) *Ex p. Glover*, 1 Glyn & J. 271; *Ex p. Edwards*, 1 Mon. & M'A. 129; *Ex p. Sly*, 2 Glyn & J. 173; *Ex p. Edwards*, 1 Mon. & M'A. 116; *Ex p. Schlesinger*, 2 Glyn & J. 392.

(*c*) *Eicke v. Nokes*, 4 M. & Scott, 568; 1 Bing. N. C. 69; 2 Dowl. 820, S. C.

BOOK III.
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the court has incidentally the power of staying, before judgment, the proceedings against such a bankrupt for such a debt (*d*).

Costs.

Costs.] By 6 G. 4, c. 16, s. 44, in every action brought against any person for anything done in pursuance of that act, if there be a verdict for the defendant, or if the plaintiff be nonsuit, or discontinue his action after appearance, or if upon *demurrer* judgment be given against the plaintiff, the defendant shall recover double costs. This provision does not apply to the case of *assignees* defendants, or those acting under their authority (*e*).

The Judgment.

The Judgment.] The judgment is the same as in ordinary cases.

Execution, &c.

Execution, &c.] As to a *ca. sa.* against a bankrupt, and his privilege from arrest, see *Vol. I.* 450, 470, 528. As to *fi. fa.* see *Vol. I.* 432. And as to an *elegit*, it is clear that a judgment obtained even before the bankruptcy of a defendant cannot be executed after it, upon lands in his *seisin* at the time of the bankruptcy (*f*). But if he had sold the lands previously to his bankruptcy, and after signing of the judgment, the plaintiff might still extend them under an *elegit* (*g*).

Liability of future Estate and Effects.

Formerly, if the defendant had been twice a bankrupt, and had not paid 15s. in the pound under his second commission, if the plaintiff knew of any effects or lands belonging to him, he might have seized them under a *fi. fa.* or *elegit*, and sold or extended them in satisfaction of his judgment. But by the 6 G. 4, c. 16, s. 127, if a person who has before been a bankrupt, and has obtained his certificate, or has compounded with his creditors, or has been discharged by an insolvent act, becomes bankrupt, and obtains his certificate, unless his estate produces (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate will only protect his *person* (*h*) from arrest and imprisonment; but his *future* estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife, and children) will *rest in the assignees* under the commission, who will be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission (*i*). And this although the former commission have been superseded (*k*); or although all the former creditors did not come in under the deed of composition (*l*); or although the party

(*d*) *Sadler v. Cleaver*, 7 Bing. 769; 5 Moo. & P. 706, S. C.

(*e*) *Worth v. Bubb*, 2 B. & Ad. 177; 1 Dowl. 328, S. C.: *Carruthers v. Payne*, 5 Bing. 270; 2 Moo. & P. 429, S. C. See *Edge v. Parker*, 3 B. & C. 697, as to what cases are not within the first part of the 44th section of 6 G. 4, c. 16, as to the limitation of actions.

(*f*) See *Tidd*, 936: 1 P. Wms. 739.

(*g*) *Tidd*, 936.

(*h*) See *Carew v. Edwards*, 2 Dowl. 613.

(*i*) See *Ex p. Hodgkinson*, 19 Ves. 291. This section vests the bankrupt's estate in his assignees absolutely, and does not leave him even a right of action, subject to their interference. (*Young v. Rishworth*, 3 Nev. & P. 585). It seems this enactment extends to cases where the former bankruptcy and certificate were anterior to the statute. (See *Robertson v. Score*, 3 B. & Ad. 338).

(*k*) *Thornton v. Dallas*, 1 Doug. 46 a.

(*l*) *Slaughter v. Cheyne*, 1 M. & Sel. 182.

taking advantage of this insufficiency of the second certificate had himself signed it (*m*). But a composition with a certain class of creditors, as for instance with joint creditors only (*n*), or a composition with all his creditors generally, if he have afterwards paid them 20s. in the pound before his bankruptcy (*o*), will not deprive a bankrupt of the benefit of his certificate. This section is similar to sect. 9 of the repealed statute, 5 G. 2, c. 30, except in the concluding words. By the repealed statute, the future estate of the bankrupt who obtained his certificate under circumstances mentioned in this section, but whose estate had not paid 15s. in the pound, was made liable to creditors in the same manner as before the passing of that act; but, by the present statute, all the future estate is *vested in the assignees* under the commission, and they take a present vested interest in such future property from the date of the assignment (*p*). And it has been held, that, as this section protects the person of the bankrupt, and vests the property in the assignees under the commission, no action will lie against the bankrupt for a debt due prior to his commission, although he had compounded with his creditors before he became bankrupt, and his estate had not paid 15s. in the pound under the commission (*q*). If the bankrupt has not obtained his certificate under the first commission, a certificate obtained under the second is absolutely void at law (*r*). A third commission against a bankrupt, whose effects have not paid 15s. in the pound, is also void (*s*).

If a bankrupt be in custody in execution for a debt provable under the commission, and obtain his certificate, he may be discharged upon application to any judge of the court wherein judgment was obtained (*t*). For this purpose, *take out a summons before a judge, and after that (if not attended to) a second summons; and upon producing the certificate, which must have been duly enrolled (u), and an affidavit that the debt accrued before the bankruptcy, and that the certificate had been obtained without fraud, the judge will make an order for the defendant's discharge.* The bankrupt will be entitled to his discharge, though he has neglected to plead his certificate, and has agreed to give a *cognovit* (*x*). Also, before the bankrupt has obtained his certificate, a creditor at whose suit he is in custody shall not be allowed to prove his debt under the commission, until he have first given a sufficient authority in writing for the discharge of such bankrupt (*y*).

Discharge on
obtaining
Certificate.

Other Points as to.] As to proceedings against members of *Other Points as to.*

(*m*) *Philpot v. Corden*, 5 T. R. 287.
(*n*) *Norton v. Shakespeare*, 15 East, 619.

(*o*) *Read v. Sowerby*, 3 M. & Sel. 78.
(*p*) *Ex p. Robinson*, 1 Mon. & M'A. 44.

(*q*) *Eike v. Nokes*, 1 M. & M. 303; and see *Robertson v. Score*, 3 B. & Ad. 338.

(*r*) *Till v. Wilson*, 1 M. & R. 580; 7 B. & C. 684, S. C.; *Fowler v. Coster*, 10 B. & C. 427; *Nelson v. Cherrill*, 8 Bing. 316; 1 M. & Scott, 452, S. C.

(*s*) *Fowler v. Coster*, 10 B. & C. 427; see *Summers v. Jones*, 6 Dowl. 139.

(*t*) 6 G. 4, c. 16, s. 126. See Vol. I. 605, 117, and the cases there cited: and Arch. Bkt. L. 210, 211. It seems that this section does not protect the goods of the bankrupt. (See *Hanson v. Blakey*, 1 Moo. & P. 261; 4 Bing. 493, S. C.: but see *Lister v. Mandell*, 1 B. & P. 427).

(*u*) See *Jacobs v. Phillips*, 2 Dowl. 716.

(*x*) *Oswald v. Williams*, 5 Dowl. 159. See fully as to his discharge, Vol. I. 117.

(*y*) 6 G. 4, c. 16, s. 59. See Arch. Bkt. L. 109, 231; *ante*, 903.

parliament, subject to the bankrupt laws, see *ante*, 839; against traders subject to the bankrupt laws, *post*, 921; and as to the time limited for bringing actions against assignees, &c., see *Arch. Bkt. L.* 301. And as to actions against the commissioners or messengers, see *Arch. Bkt. L.* 13. By statute 3 & 4 *W. 4, c. 42, s. 9, ante*, 651, in the case of a joint demand, where one of the parties has become bankrupt and obtained his certificate, there is no occasion to join him in the action as a defendant.

CHAPTER X.

ACTIONS BY AND AGAINST IDIOTS AND LUNATICS.

CHAP. X.

IDIOTS and lunatics may be holden to bail, and arrested, Arrest of. in the same manner and under the same circumstances as other persons; and the court will not discharge them out of custody on account of their insanity (*a*), even although the fact of their insanity have been established by a commission of lunacy previously to the arrest (*b*). Nor will the court allow an *exoneretur* to be entered on the bail-piece, merely on account of the insanity of the principal (*c*); but the bail must render him in their discharge (*d*).

An idiot plaintiff must appear in person, and then any one Proceedings, &c., by Idiot. who prays to be admitted as his friend may sue for him (*e*); if defendant, he must also appear in person, and any one who can make a better defence shall be allowed to defend for him (*e*). Where a plaintiff had been delirious, and, on apparently recovering, he brought an action against his bankers to recover money belonging to him in their hands, the court would not oblige him to give an indemnity to the bankers, on payment by them to him of the sum for which the action was brought (*f*).

A lunatic sues and defends in the same manner as other By Lunatic persons: if of age, either in person or by attorney; if under age, he must sue by *prochein amy* or guardian, and defend by guardian, as mentioned *ante*, 889, 890. When the defendant was a lunatic, and a *distringas* issued to which there was a return of *nulla bona* and *non est inventus*; an affidavit having been produced that it was known where the lunatic was living, but that his keeper refused to allow him to be seen so that he might be served, the court notwithstanding refused to allow an appearance to be entered for him, and suggested that proceedings should be taken against the keeper (*g*).

The wife of a lunatic who has no committee, has a sufficient implied authority to sue in his name for debts due to him (*h*); or to apply for his discharge under the Small Debtors' Act (*i*). Right to sue in Lunatic's Name.

As to the limitation of a writ of error, see *ante*, Vol. I. Error. 346, 347.

As to the service of an ejectment in case of lunacy, see Ejectment. *ante*, 742.

(a) *Nutt v. Ferney*, 4 T. R. 121: *Ker- not v. Norman*, 2 Id. 390.

(b) *Ante*, Vol. I. 473: *Steel v. Alan*, 2 B. & P. 362.

(c) *Ante*, Vol. I. 635: *Iboston v. Lord Galloway*, 6 T. R. 133.

(d) *Ante*, Vol. I. 623.

(e) *Beverley's Case*, 4 Co. 124: see Co. Lit. 135: and *ante*, Vol. I. 49.

(f) *Hope v. Watson*, 2 Leg. Obs. 413, per *Patteson, J.*: *Tidd*, New Prac. 265.

(g) *Starkie v. Skilbeck*, 6 Dowl. 54.

(h) *Rock v. Slade*, 7 Dowl. 22.

(i) *Clay v. Bowler*, 6 Nev. & M. 814.

CHAPTER XI.

BOOK III.
PART II.

ACTIONS AGAINST JUSTICES OF PEACE, CONSTABLES, &c.

Limitation of
Action.
Against Jus-
tices, Consta-
bles, &c.

Limitation of Action.] ACTIONS against justices of peace (*a*) for anything done by them in the execution of their office (*b*), or against constables, headboroughs, or other persons acting by their orders or in their aid, must be commenced within six calendar months after the cause of action has accrued (*c*). The six months are to be reckoned exclusive of the day of committing the act (*d*); for instance, if the imprisonment or cause of action ends on the 14th of December, it is a sufficient commencement of the action if the writ issue on the 14th of June (*e*). In case of a continuing imprisonment, a justice is liable to answer for such part of it suffered under his warrant as was within six calendar months before the action commenced (*f*). In case of an action for a distress for church-rate, the three months limited for bringing the action are to be reckoned from the time at which the distress was sold (*g*). If the writ upon which the plaintiff declares has not been sued out within the six months, and the record does not, as it usually does and ought to do, state the day of the issuing of the first writ, proof must be given at the trial that it was regularly continued down from a writ sued out within that time (*h*).

Against Offi-
cers of Excise
and Customs.

Actions brought against officers of the customs, &c., for anything done by them in the execution of their duty, shall be commenced within six lunar (*i*) months (*j*); and actions against officers of the excise, &c., within three calendar months (*k*), after the cause of action has accrued (*l*).

Notice of
Action, &c.
Against Jus-
tices.

Notice of Action, Demand of Warrant, &c.] Before an action can be commenced against a justice of peace (*m*) for anything done (*n*) by him in the execution of his duty (*o*), the attorney or agent for the plaintiff (*p*) must, one calendar month at least (*q*) previously to his suing out any writ against any such justice, or causing him to be served with process,

(a) See fully, Burn's J., 28th ed., tit. "Justices," "Constables."

(b) See cases cited in note (*n*), *infra*.

(c) 24 G. 2, c. 44, s. 8; 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41. See the statute and cases cited in 3 Burn's J., 28th ed. 495; 1 Id. 805.

(d) *Clarke v. Davey*, 4 Moore, 465; *Hardy v. Ryle*, 4 M. & R. 295.

(e) *Hardy v. Ryle*, 9 B. & C. 603.

(f) *Massey v. Johnson*, 12 East, 67.

(g) *Collins v. Rose*, 5 M. & W. 194.

(h) *Weston v. Fournier*, 14 East, 491. See the mode of entering and continuing the writ, *post*, 924.

(i) *Croker v. Mactavish*, 1 Bing. 307; 8 Moore, 265, S. C.

(j) 6 G. 4, c. 108, s. 97.

(k) 7 & 8 G. 4, c. 53, s. 115.

(l) See *Saunders v. Saunders*, 2 East, 254; *Godin v. Ferrie*, 2 H. Bl. 14.

(m) See the 24 G. 2, c. 44. And as to who is a justice within it, see *Jones v. Williams*, 3 B. & C. 762; 5 D. & R. 654, S. C.; *Morgan v. Palmer*, 2 B. & C. 729; *Briggs v. Evelyn*, 2 H. Bl. 114; *Entinck v. Carrington*, 2 Wils. 275; 3 Burn's J., ed. 28, 587.

(n) *Wright v. Horton*, Holt, C. N. P. 458; see *Fletcher v. Greenwood*, 1 Gale, 34; *Charlesworth v. Rudgard*, 1 Gale, 42.

(o) What acts entitle a justice to this notice, see 3 Burn's J., 28th ed. 587, and cases there collected; Rosc. 475; *Beechey v. Sides*, 9 B. & C. 809; *Parton v. Williams*, 3 B. & Ald. 330; *Wedge v. Berkeley*, 1 Nev. & P. 665.

(p) As to notice of action by an attorney for an infant, see *De Goudouin v. Lewis*, 2 Per. & D. 283.

(q) See *Castle v. Burdett*, 3 T. R. 623.

deliver to him a notice in writing of such intended writ, &c., or leave such notice at his usual place of abode; in which notice the cause of action shall be clearly and explicitly stated (*r*), and the name of such attorney or agent, and his place of abode, shall be indorsed thereon (*s*); and the attorney or agent shall be entitled to the fee of 20s. for preparing and serving such notice, and no more. And if the plaintiff fail to prove such notice at the trial, the justice shall recover a verdict and costs (*t*), and the plaintiff shall not give evidence of any cause of action except that mentioned in the notice (*u*). It has been universally held, that where a magistrate *bonâ fide* believes or supposes he is acting in the execution of his duty as such, he is within the protection of this clause (*x*). But where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, notice is not required (*y*). Thus it is not required in an action against a justice for not being duly qualified (*z*). And a party making a wrongful distress for two causes, as to one of which he is entitled to notice of action, is nevertheless liable in trespass, as to the other (*a*). The statute extends only to actions of tort (*b*). The month begins with, and includes, the day on which the notice was served (*c*).

Before an action can be commenced against an officer of the excise or customs, or any person acting by his orders or in his aid (*d*), for anything done by him in the execution of his duty (*e*), the attorney or agent for the plaintiff must, one calendar month, at least, previously to his suing out any writ or process against such officer, deliver to him, or leave for him at his usual place of abode, a notice in writing, stating clearly and explicitly the cause of action (*f*), and the names and places of abode (*g*) of the plaintiff and of the attorney or agent respectively, and the plaintiff shall not give evidence of any cause of action not contained in the notice (*h*). The notice of action must be proved in the first instance before any other evidence is given (*i*).

Against Officers of Excise or Customs.

Before any action can be brought against the constable or other officer or person for anything done in pursuance of the 7 & 8 G. 4, c. 29, s. 30, notice in writing, and of the cause thereof, must be given to the defendant one calendar month at least before the commencement of the action; and the officer, &c., may tender amends, &c. (*k*).

Against Constable, &c., under 7 & 8 G. 4, c. 29.

Also, when an action is intended to be brought against a

Demand of Warrant.

(*r*) As to the form of such notice, see 3 Burn's J., 28th ed. 588, and cases there collected: Chit. Forms, 531.

(*s*) As to the indorsements, &c., see 3 Burn's J., 28th ed. 588.

(*t*) 24 G. 2, c. 44, s. 3.

(*u*) Id. 55.

(*x*) *Wedge v. Berkeley*, 1 Nev. & P. 665.

(*y*) *James v. Saunders*, 10 Bing. 429; 4 Moo. & Scott, 316, S. C.: *Morgan v. Palmer*, 2 B. & C. 729; *Livet v. Reid*, Peake, 35.

(*z*) *Wright v. Horton*, Holt, 458.

(*a*) *Lamont v. Southall*, 7 Dowl. 469.

(*b*) B. N. P. 24.

(*c*) 24 G. 2, c. 44, s. 1: *Castle v. Burditt*, 3 T. R. 623. See the form of the notice, Chit. Forms, 531.

(*d*) See *Clements v. Keen*, 2 Smith,

220: *Irving v. Wilson*, 4 T. R. 485; *Greenway v. Hard*, Id. 553; *Wallace v. Smith*, 5 East, 122; *Williams v. Burgess*, 3 Taunt. 127.

(*e*) See *Daniel v. Wilson*, 5 T. R. 1; *Rez v. Brady*, 1 B. & P. 187; *Norton v. Miller*, 2 Chit. Rep. 140; Rosc. 461.

(*f*) See note (*r*), *supra*.

(*g*) It will be observed that the statute requires the statement of the plaintiff's place of abode, and not of his business. (See *Johnson v. Lord*, 1 M. & M. 444).

(*h*) 6 G. 4, c. 108, ss. 93, 94: 7 & 8 G. 4, c. 53, s. 114. See note (*r*), *supra*. See the form of the notice, Chit. Forms, 532.

(*i*) *Johnson v. Lord*, 1 M. & M. 444.

(*k*) 7 & 8 G. 4, c. 29, s. 75: 7 & 8 G. 4, c. 30, s. 41.

BOOK III.
PART II.

constable or other officer (*l*), or any person acting by his order or in his aid, for anything done by him in obedience to a warrant under the hand and seal of a justice of peace (*m*), a demand in writing of the perusal and copy of such warrant, signed by the party demanding the same, (or by his attorney) (*n*), must be made, or left at the usual place of abode of such constable or officer (*o*), by the plaintiff or his attorney or agent; and if the perusal and copy of the warrant be not granted within six days after being thus demanded, (or before the action has been commenced) (*p*), the plaintiff may bring his action against the constable or other officer alone; but if such perusal and copy be granted, then, if the plaintiff sue the constable, &c., without making the justice also a party, upon proof of the warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in the justice who made the warrant. Or if the action be brought jointly against the justice and such constable, &c., then, upon proof of the warrant, the jury shall find a verdict for such constable; but if they find a verdict also against the justice, he shall pay to the plaintiff as well his costs in the action, as also such costs as the plaintiff may have been obliged to pay to the other defendant (*q*). It may be as well to mention, that this relates to actions of trespass and on the case only (*r*), and not to *assumpsit* (*s*), *replevin* (*t*), or the like.

Declaration.
Venue.

Declaration.] The *venue* must be laid in the county in which the facts complained of were committed, in all actions of trespass or on the case, against justices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, portreeves, constables, tithing-men, churchwardens, &c., or other persons acting in their aid or by their command (*u*), and in actions against officers of the customs (*x*) or excise (*y*), or persons acting in their aid, for anything done in execution of their respective offices. And the same in actions against all other persons holding a public employment, civil or military, in or out of this kingdom, having thereby authority to commit to safe custody; or if the fact be committed out of the kingdom, the plaintiff may lay the matter as having been done at Westminster, or in the county in which the defendant shall then reside (*z*). The declaration is in form the same as in ordinary cases.

Plea and other *Plea and other Proceedings, &c.*] By several statutes, in

(*l*) See the statutes and cases in 1 Burn's J., 28th ed. 839: *Harper v. Carr*, 7 T. R. 270; Bul. N. P. 24: *Entick v. Carrington*, 2 Wils. 275. It extends to gaolers, 1 Gow, Rep. 97.

(*m*) See 1 Burn's J., 28th ed. 840: *Sturch v. Clarke*, 2 B. & Ad. 113: *Price v. Messenger*, 2 B. & P. 158; 3 Esp. 96, S. C.: *Postlethwaite v. Gibson*, 3 Esp. 226: *Money v. Leech*, 3 Burr. 1742: *Milton v. Green*, 5 East, 233: *Coupey v. Henley*, 2 Esp. 542, n.: *Anon.*, 1 Str. 446: *Bell v. Oakley*, 2 M. & Sel. 259: *Theobald v. Crichmore*, 1 B. & Ald. 227: *Parton v. Williams*, 3 Id. 330.

(*n*) 1 Burn's J., 28th ed. 843; *Jory v. Orchard*, 2 B. & P. 42. See the form,

Chit. Forms. 532.

(*o*) See *Clarke v. Davey*, 4 Moore, 465: 1 Burn's J., 28th ed. 842.

(*p*) *Jones v. Vaughan*, 5 East, 445.

(*q*) 24 G. 2, c. 44, s. 6.

(*r*) *Lyons v. Golding*, 3 C. & P. 586.

(*s*) Bul. N. P. 24.

(*t*) *Fletcher v. Wilkins*, 6 East, 283: *Waterhouse v. Keene*, 4 B. & C. 211; 6 D. & R. 257, S. C.

(*u*) 21 J. 1, c. 12, s. 5; 7 & 8 G. 4, c. 29, s. 75; c. 30, s. 41. See *Holton v. Boldero*, cited *per cur.*, 5 Bing. 339.

(*x*) 6 G. 4, c. 108, s. 97.

(*y*) 7 & 8 G. 4, c. 53, s. 115.

(*z*) 42 G. 3, c. 85, s. 6; and see 6 G. 4, c. 108, s. 97.

actions against justices of peace, constables, &c., officers of excise and customs, &c., and all other persons holding public employments, and having authority to commit to safe custody, as above mentioned, for anything done by them in execution of their respective offices, the defendants are not bound to plead any matter of justification, &c., specially, but may give it in evidence under the *general issue* (*b*). The words "by statute" should be inserted in the margin of the plea, otherwise it will have only the same effect as in ordinary cases (*c*). Where a person is not an officer within the meaning of these enactments, though he may have supposed he was so, he is not within the protection given by them (*d*).

CHAP. XI.
Proceedings,
&c.

Justices of peace (*e*), and officers of the customs and excise (*f*), and constables and other officers and persons acting under the 7 & 8 G. 4, c. 29, or 7 & 8 G. 4, c. 30 (*g*), may *tender amends* before action brought, and plead such tender, together with the general issue or other plea, with the leave of the court; or, if they have neglected to tender amends, or the tender be insufficient, they may pay money into court (even after issue joined and notice of trial given) (*h*); and such proceedings are thereupon to be had as in ordinary cases (*i*).

Tender of
Amends and
Payment into
Court.

The plaintiff is bound, by the statutes above mentioned, to prove at the trial the service of the notice, otherwise the defendant shall be entitled to a verdict; and he is restricted in his proof by this notice, in the same manner as he is by a bill of particulars (*k*).

Proof of Notice.

As to damages in actions against justices of peace (*l*), and in actions against officers of the excise or customs, see *ante*, Vol. I. 326.

Damages.

Costs.] If the plaintiff obtain a verdict, still, in actions against officers of the customs or excise, he shall not be entitled to costs, if the judge certify that there was probable cause for the seizure, &c. (*m*). And by the 43 G. 3, c. 141, s. 1, in all actions against any justice of the peace, on account of any conviction made by him under any act of parliament, or for any act done by him for levying any penalty, or apprehending any party, or for carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty levied upon him, (if any), shall not recover any greater damages than twopence, nor any costs, unless it be expressly alleged in the declaration in the action, (which action shall be on the case only), that the acts complained of were done maliciously

Costs.
For the Plaintiff.

(b) 21 J. 1, c. 12, s. 5; 7 & 8 G. 4, c. 29, s. 75; c. 30, s. 41; 42 G. 3, c. 85, s. 6; 6 G. 4, c. 108, s. 97; 7 & 8 G. 4, c. 53, s. 115. See 1 Burn's J., 28th ed. 844; 3 Id. 595.

(c) R. T. 1838.

(d) *Copland v. Powell*, 8 Moore, 400; 1 Bing. 369, S. C.: *Jones v. Williams*, 3 B. & C. 762; 5 D. & R. 654, S. C.

(e) 24 G. 2, c. 44, ss. 2, 4; 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41. See 3 Burn's J., 28th ed. 593.

(f) 6 G. 4, c. 108, ss. 95, 96; 7 & 8 G. 4, c. 53, ss. 116, 117.

(g) 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41.

(h) *Nestor v. Newcomb*, 3 B. & C. 159; and see *Devaynes v. Boys*, 5 Taunt. 33; 2 Marsh. 356, S. C.

(i) See *Casbourn v. Ball*, 2 W. Bl. 859; *Stringer v. Martyr*, 6 Esp. 134; *Collins v. Morgan*, 1 H. Bl. 244.

(k) See *Stringer v. Martyr*, 6 Esp. 134.

(l) See *Massey v. Johnson*, 12 East, 67.

(m) 2 G. 4, c. 108, s. 92; 7 & 8 G. 4, c. 29, s. 75; c. 30, s. 41; 7 & 8 G. 4, c. 53, s. 119. See *Laugher v. Bepfit*, 5 B. & Ald. 762; 1 D. & R. 417, S. C.

BOOK III.
PART II.

and without reasonable or probable cause. And by section 2, the plaintiff is not to recover any penalty or damages or costs whatsoever, in case the justice shall prove at the trial that the plaintiff was guilty of the offence for which he was convicted, and that he has undergone no greater punishment than was assigned by law for such offence (*n*). This statute only protects the magistrate where there has been a conviction quashed. But an informal one is enough, as where the warrant of commitment falsely recited an information by T. S., which was, in fact, laid by T. O. (*o*). But if, in actions against justices, constables, &c., the judge certify that the injury was wilfully and maliciously committed, it seems the plaintiff is entitled to double costs (*p*).

For the Defendant.

The defendant, if he have a verdict, or if the plaintiff be nonsuit or discontinue the action, is entitled to double costs, in actions against justices, constables, &c. (*q*); to treble costs in actions against officers of customs or excise (*r*); and to double costs in actions against other persons holding public employment, civil or military, in or out of the kingdom, and having power to commit to safe custody (*s*). Where, in an action against magistrates for an act done in the performance of their duty as such, the plaintiff obtained a rule of court to remove the action to a county different from that in which it was brought, he undertaking by the rule to pay the defendants' costs of the removal, the defendants obtained a verdict, it was held that the defendants' costs of the removal were not to be doubled under the 7 *Jac.* 1, c. 5, and 21 *Jac.* 1, c. 12 (*t*). In order to entitle an officer to double or treble costs under these statutes, he must obtain a certificate from the judge, at or after the trial, that the action was brought against him as such officer, for something done by him in the execution of his duty (*u*). And it has been lately held, that a certificate that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the statute 7 *Jac.* 1, c. 5, need not be granted immediately after the trial of the cause; and where the plaintiff was nonsuited, it was considered that the judge before whom the cause was tried, might, after an interval of four years, upon an affidavit that the defendant was within the provisions of the statute, grant a certificate to entitle him to double costs (*x*).

(*n*) 43 G. 3, c. 141: see 7 & 8 G. 4, c. 29, s. 75: see 7 & 8 G. 4, c. 30, s. 41: *ante*, Vol. I. 326. See *Rogers v. Jones*, 3 B. & C. 409; 5 D. & R. 268, S. C.: *Gray v. Cookson*, 16 East, 13; and *Burley v. Bethune*, 5 Taunt. 84.

(*o*) *Massey v. Johnson*, 12 East, 67.

(*p*) 24 G. 2, c. 44, s. 7.

(*q*) 7 J. 1, c. 5: 21 J. 1, c. 12: and see 7 & 8 G. 4, c. 29, s. 75: 7 & 8 G. 4, c. 30, s. 41: *Blanchard v. Bramble*, 3 M. & Sel. 131: *Mackey v. Goodden*, 1 Dowl. 463. See 1 Burn's J., 28th ed. 845; 3 Id. 595.

(*r*) 6 G. 4, c. 108, s. 97: 7 & 8 G. 4, c.

53, s. 115.

(*s*) 42 G. 3, c. 85, s. 6.

(*t*) *Thomas v. Saunders*, 1 Ad. & El. 552.

(*u*) *Penney v. Slade*, 7 Dowl. 440: *Harpur v. Carr*, 7 T. R. 448: *Grindley v. Holloway*, 1 Doug. 307, 308, n.: *Devenish v. Mertins*, 2 Str. 974: *Johnson v. Stanton*, 2 B. & C. 621; 4 D. & R. 156, S. C.: and see *Atkins v. Bamwell*, 3 East, 92: *Wells v. Ody*, 3 Dowl. P. C. 799; 2 C., M. & R. 128, S. C.

(*x*) *Norman v. Danger*, 3 Y. & J. 203.

CHAPTER XII.

ACTIONS AGAINST CLERGYMEN.

CHAP. XII.

CLERGYMEN are, as has been already noticed, privileged from arrest while performing divine service, and while going to church for that purpose, and returning thence (*a*). The only other peculiarity in the mode of proceeding against clergymen is in the execution, and which is as follows:—

When the sheriff, to a common *feri facias*, returns *nulla bona*, and that the defendant is a beneficed clerk, not having any lay fee (*b*), the plaintiff may sue out a *feri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, or to the archbishop, (during the vacancy of the bishop's see), commanding him to make of the ecclesiastical goods and chattels belonging to the defendant, within his diocese, the sum therein mentioned (*c*). It is tested and returnable, and must be sealed and indorsed, in the same manner as a common *feri facias* (*d*). Take this writ to the register of the diocese, who will thereupon issue a sequestration (*e*), (which is in the nature of a warrant), directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice. This sequestration must be published, by reading it in the parish church during divine service; and afterwards at the church door, and fixing a copy thereon, provided that be the usual mode of publication in the diocese where the sequestered benefice is situated (*f*); and, as the writ does not begin to operate and has priority only from the time of this publication (*g*), it should be done without delay. It has been accordingly recently held, that a sequestration obtained by the assignees of an insolvent incumbent, operates only from the time of publication, and does not entitle the assignees to the arrears of composition for tithes due before publication (*h*). But the property as against the defendant is, it seems, bound from the time when the sequestrator is appointed, and the publication is only necessary in order to give security against conflicting rights (*i*). Instead of directing this sequestration to the churchwardens, the plaintiff, upon giving security to the bishop, may have it directed to persons of his nomination (*k*).

If the entire debt be not levied in one diocese, the plaintiff, upon the return of the writ, may have a *testatum fi. fa. de bonis* Testatum, alias, &c.

(a) 50 Ed. 3, c. 5: 1 R. 2, c. 16: see *Goddard v. Harris*, 7 Bing. 320; 5 Moo. & P. 122, S. C.; and see 9 G. 4, c. 31, s. 23.

(b) See *Pickard v. Pacton*, 1 Sid. 276: Dalt. 219. And see the form of this return, Chit. Forms, 175.

(c) See 2 Bac. Abr., Execution, G. 6: *Walwyn v. Auberry*, 2 Mod. 258. And see the form of the writ, Chit. Forms, 533.

(d) See Vol. I. 419, 435, &c.

(e) See forms, Tidd's Forms, 380.

(f) *Bennett v. Apperley*, 6 B. & C. 630.

(g) *Wait v. Bishop*, 3 Dowl. P. C. 234; 1 C., M. & R. 507, S. C.: 1 Crompt. 359: Tidd, 9th ed. 1024.

(h) *Waite v. Bishop*, 1 C., M. & R. 507; 3 Dowl. P. C. 234, S. C. Lodging the writ with the registrar of the bishop of the diocese does not bind the property of the incumbent from the time of such lodging. (Id.: see post).

(i) *Per Bayley, J., Bennett v. Apperley*, 6 B. & C. 630.

(k) 3 Burn, Eccl. Law, 317: Tidd, 9th ed. 1023.

BOOK III.
PART II.Sequestrari
Facias.

ecclesiasticis into another diocese, for the residue (*l*); or he may have an *alias* into the same diocese.

Or, instead of a *fieri facias de bonis ecclesiasticis*, the plaintiff may sue out a writ of *sequestrari facias*, directed, tested, and returnable, &c., as the *fieri facias*, commanding the bishop to enter into the rectory and parish church, and to take and sequester the same, and hold them, until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt (*m*). It is not necessary, even for the purpose of proving the issuing of this writ, that there should be an award of it on the roll (*n*). It is in the nature of a *levari facias*; the writ above mentioned in the nature of a *fieri facias*. The sequestration issued in a *sequestrari facias*, is a charge upon all the rents and profits, including the glebe-lands of the benefice, except the parsonage house in which the incumbent is bound to reside, so as to disqualify him under the 18 G. 2, c. 20 (*n*).

After Out-
lawry.

If, to a special *capias utlagatum*, the sheriff returns an inquisition, finding that the defendant had benefices but no lay fee, the court will award a writ of sequestration on reading the transcript of the outlawry and inquisition (*o*). But not unless the benefice be specified in the return (*p*).

Execution
and Return
of.

Either of these writs is a continuing execution, that is, continuing until all that has been commanded to be levied is levied; and if the sequestration issue before the writ is returnable, it is sufficient though it be not published till afterwards (*q*). And the plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ (*r*). If, however, it be actually returned, the bishop's authority is determined (*r*). A sequestration, as above observed, is in the nature of a *levari facias* at common law, and the party sequestering has neither *jus in rem vel in re*; the legal estate of the premises remaining in every respect as before (*s*). It seems, that a return merely setting out the debtor and creditor account of the sequestrator is insufficient, but that it should be verified (*t*).

The defendant has no right to have the writ returned, though he may have a return of the amount of the profits received by the sequestrator (*u*).

Rule to Re-
turn, &c.

The bishop, with reference to these writs, stands in the same situation precisely as the sheriff with reference to writs in ordinary cases, and may be ruled, and is bound to obey the orders of the court, as to their execution, &c., in the same manner as the sheriff (*v*).

Setting aside
Sequestration.

On an application to set aside the sequestration of a benefice issued by the bishop, it is perhaps requisite that the bishop be made a party to the rule (*x*).

(*l*) See the form, Chit. Forms, 534.

(*m*) See the form, Chit. Forms, 534: and see *Marsh v. Fawcett*, 2 H. Bl. 582.

(*n*) *Pack v. Tarpley*, 1 Per. & D. 478.

(*o*) *Rex v. Hind*, 1 Dowl. 286; 1 C. & J. 349; 1 Tyr 347, S. C.: and see *Re v. Armstrong*, 3 Dowl. 760.

(*p*) *R. v. Powell*, 1 M. & W. 321.

(*q*) *Bennett v. Apperley*, 6 B. & C. 630: see *Colebrooke v. Layton*, 1 Nev. & M. 354: *Cottle v. Warrington*, 5 B. & Ad. 447.

(*r*) *Marsh v. Fawcett*, 2 H. Bl. 582: see *Phillips v. Berkely*, 5 Dowl. 273.

(*s*) 1 P. Wms 307.

(*t*) *Elchin v. Hopkins*, 7 Dowl. 146.

(*u*) *Hart v. Vollans*, 1 Dowl. 484.

(*v*) See *Rex v. Bishop of London*, 1 D. & R. 486: *Bennett v. Apperley*, 6 B. & C. 630; 9 D. & R. 673, S. C.: see *Phillips v. Berkely*, 5 Dowl. 279.

(*w*) *Bishop v. Hatch*, 1 Ad. & El. 171.

The 55th section of the 1 & 2 V. c. 110, enacts, that the assignees of a clergyman shall not be entitled, as such, to the income of his benefice or curacy for the purposes of that act, but provides that they may apply for and obtain a sequestration of the profits of his benefice for payment of his debts, and that the order for their appointment in pursuance of the act shall be a sufficient warrant for granting such sequestration without any other proceedings, and that the sequestration shall be issued, as it might have been issued upon any writ of *levari facias* on a judgment against the prisoner. Under the corresponding section in the former act, the title of the assignees to a sequestration commenced with the *order of adjudication*, and not with the *order of appointment*, as will be the case under the present act. Under the former act it was held (*g*), that a creditor who had commenced his action after the imprisonment of the insolvent and obtained judgment, and procured sequestration before adjudication, was entitled to priority over the assignees, who were considered to stand merely as judgment-creditors from the time of adjudication. And this, substituting appointment for adjudication, is still the case, so that a creditor who takes care to procure sequestration before the assignees will secure the payment of his debt, so far as the profits of the benefice extend, to the prejudice of the other creditors.

(*g*) *Bishop v. Hatch*, 1 Ad. & El. 171: see *Waite v. Bishop*, 1 C., M. & R. 507.

CHAPTER XIII.

BOOK III.
PART II.

ACTIONS BY PAUPERS.

Who admitted
to sue in
Forma Pau-
peris, and in
what Cases.

Who admitted to sue in Forma Pauperis, and in what Cases.] EVERY poor person, who may have cause of action, shall have writs according to the nature of his case, without paying for the sealing or writing the same; and the justices shall assign him counsel and attorneys, who, together with the officers of the court, shall act *gratis* (a). The party applying must swear that he is not worth 5*l.*, excepting his wearing apparel, and the matter in question in the cause (b). It is discretionary with the court or chief justice to grant the indulgence of suing thus *in forma pauperis*. They will not grant it in any vexatious action. And it will not be granted in a second ejectment, where the costs of a prior ejectment for the same cause are unpaid (c).

It is confined to plaintiffs, and cannot be granted to a defendant in a civil action in a court of law (d). A person may be admitted to sue *in forma pauperis* by *prochein amy*, and the application for this purpose may form the subject of one motion (e).

When ad-
mitted.

When admitted.] It has been the practice to grant the order for admission to sue *in forma pauperis* either at the commencement of the suit, or at any subsequent period of it (f). But the Court of Exchequer, in a recent case, held that such an order, made after the commencement of the suit, was irregular; and that the plaintiff should either submit to be dispaupered, or find security for costs (g). The point, however, can hardly be considered as finally settled.

How admit-
ted.

How admitted.] The party may be admitted, either upon motion in court (h), or (which is the mode usually adopted) upon petition to the chief justice or chief baron of the court (i). *Write an affidavit to the effect above mentioned, on plain paper (i), and have it sworn by the pauper, before a judge or commissioner. Write out a petition also on plain paper, and signed by the pauper, stating the cause of action, and praying to be admitted to sue in forma pauperis, and that counsel and attorney (naming them) may be assigned to him (i); and at the foot of it, get counsel to subscribe his opinion shortly, that the plaintiff has good cause of action (i). Annex the affidavit to the petition;*

(a) 11 H. 7, c. 12: and see 23 H. 8, c. 15, s. 2.

(b) R. H., 3 & 4 J. 2, r. 1, a: Lil. Pr. Reg. 633: Tidd, 9th ed. 98.

(c) *Goodtitle v. Mayo*, Tidd, 9th ed. 98; see *Weston v. Withers*, 2 T. R. 511.

(d) *Anon.*, Barnes, 328: 16 Vin. Ab. 259, pl. 4. The Court of Exchequer say, in an information on the excise laws, allow a party to defend as pauper. (See *Attorney-General v. Dummia*, 2 C. & M. 393; 4 Tyr. 284, S. C.: R. v. *Wright*, Hard. 211, 253.) So on an indictment he

may be allowed to defend as a pauper. (See R. v. *Page*, 1 Dowl. 507: R. v. *Wilkins*, Id. 536).

(e) *Bryant v. Wagner*, 7 Dowl. 676.

(f) See *Blood v. Lee*, 3 Wils. 24, per *Wilmet*, C. J.: *Jones v. Peers*, 1 M'Clel. & V. 552: *Morgan v. Eastwick*, 7 Dowl. 543.

(g) *Lovewell v. Curtis*, 5 M. & W. 158: see *Foss v. Racine*, 4 M. & W. 610; 7 Dowl. 203, S. C.

(h) See R. H., 3 & 4 J. 2, r. 1.

(i) See the form, Chit. Forms, 536.

take them to the chief justice's chambers, and his clerk will thereupon make out the order(k); if moved for in court, annex the affidavit and opinion to the brief: and, afterwards, draw up the rule with one of the masters. The rule need not be drawn up on reading counsel's certificate, as that instrument is only for the information of the court(l). Take this rule or order to the different offices through which you pass the proceedings, in order to avoid any demand for fees; and annex a copy of it to the declaration, (or to the next proceedings after obtaining the order, if after action), before you deliver or file it. There is a rule in the Exchequer(m) that no person shall be admitted in *formâ pauperis*, unless the attorney to be assigned, or his clerk, attend a baron with a petition for his admission, and that no counsel shall be assigned unless such counsel only who hath certified the cause of such action and petition. In a recent case on an application for leave to sue in *formâ pauperis*, without obtaining the certificate of a barrister, it was stated, that the action intended to be brought was a second action; that the counsel who signed upon the former occasion was out of town, and that the applicant apprehended counsel would be unwilling to sign his certificate: the court refused the application, thinking it prematurely made(n).

Effect of Admission.] The order for admission extends only to the particular cause in which it is granted(o); and, if granted *pendente lite*, it has, in general, no retrospective effect(p).

Effect of Admission.

After admission to sue in *formâ pauperis*, the plaintiff shall be at liberty to carry on all the proceedings without paying fees to the officers of the court, or to his counsel or attorney. But, if he afterwards have judgment in the action for more than 5*l.*, the counsel, attorney, and officers are, it seems, entitled to their fees, at least to such fees as shall be allowed by the master in taxing the costs(q); for, although they perform their several duties for the pauper gratuitously, his adversary should not be allowed to derive any advantage or benefit from that circumstance.

No Fees, &c., payable by Pauper.

A pauper is entitled to costs in all cases in which other plaintiffs are entitled to them; but in no case (except where he omits to proceed to trial pursuant to notice, or an undertaking, as noticed *infra*) is he obliged to pay costs to the defendant(r). And a pauper is entitled to his costs from the commencement of the action, although admitted to sue in that character in the progress of it; and, therefore, the defendant cannot stay proceedings on payment of the debt only(s). The defendant is not even entitled to have costs of issues, on

Costs as against Defendant.

(k) See the form, Chit. Forms, 537.

(l) *Bryant v. Wagner*, 7 Dowl. 676.

(m) R. E., 3 G. 1.

(n) *Stockdale v. Hansard*, 1 Jurist, 355.

(o) Lib. Pr. Reg 633: and see *Gibson v. M'Carty*, Hardw. 311.

(p) *Jones v. Peers*, 1 M'Clel. & Y. 282; where through the laches of the defendant it obtained a retrospective effect. (See *Blood v. Lee*, 3 Wils. 24).

(q) In *James v. Harris*, 7 C. & P. 257, it was ruled by *Williams, J.*, that if the

pauper obtain a verdict for more than 5*l.* the officers should be paid their court fees, and for passing the record, &c.; but *Parke, B.*, in *Grainger v. Lane*, (4 Dowl. 482), expressed a doubt whether they were so entitled, though 5*l.* were recovered.

(r) See 23 H. 8, c. 15, s. 2: *Rice v. Brown*, 1 B. & P. 30: *Blood v. Lee*, 3 Wils. 24.

(s) *Morgan v. Eastwick*, 7 Dowl. 543.

BOOK III.
PART II.Costs between
Attorney and
Client.

which he or his co-defendant succeeds, set off or deducted from the plaintiff's costs(*t*).

It may be added, that if a pauper be admitted to defend a suit in Chancery *in formâ pauperis*, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit(*u*).

Proceedings
in the Cause.

Proceedings in the Cause.] The proceedings in the cause are the same as in ordinary cases.

In what Cases
dispaupered
or compelled
to pay Costs.

In what Cases dispaupered or compelled to pay Costs.] Though an order has been made for admitting a party to sue *in formâ pauperis*, yet, if it appear that the plaintiff has no meritorious cause of action, or that he has acted vexatiously or improperly in the conduct of the suit, the court will discharge the order, though a judge's order for that purpose must be made a rule of court before the court will entertain a motion to discharge it(*x*). Also, by 23 *H.* 8, *c.* 15, *s.* 2, the pauper shall not pay costs, but shall suffer such other punishment as the court shall deem reasonable. The only punishment, however, which the court ever inflict, and this only in cases where the pauper has been guilty of very gross laches or other misbehaviour(*y*), is to dispauper him; and, when thus dispaupered, he is not liable for costs previously incurred(*z*). In a case where a pauper gave notice of trial, and on the second day of the assizes withdrew his record, on the ground of its requiring amendment, the court dispaupered him(*a*). A plaintiff cannot be dispaupered after judgment as in case of a nonsuit, because the action is then at an end(*b*).

Also, by the *R. H.*, 2 *W.* 4, *r.* 10, "where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered." And where the pauper withdrew his record because he was not prepared with a necessary document at the assizes, the court compelled him to pay the costs of the day(*c*). And the court have stayed proceedings in a second action by a pauper, until the costs of a nonsuit in a former action for the same cause were paid(*d*); though there are instances in which they have refused even this(*e*).

(*t*) *Gougenheim v. Lane*, 4 Dowl. 482, and the cases in the note: *Foss v. Racine*, 4 M. & W. 610; 7 Dowl. 203, S. C.

(*u*) *Phillips v. Baker*, 1 C. & P. 533.

(*x*) *Hawes v. Johnson*, 1 Y. & J. 10.

(*y*) See *Winter v. Slow*, 2 Str. 878, 983; *Doe Leapingwell v. Trussell*, 6 East, 505; and see *Anon.*, 2 Salk. 507; *Ancell v. Sloman*, 8 Mod. 344. It has been said that if a pauper be nonsuit, he shall pay costs or be whipped, but this punishment does not appear to have been ever inflicted. (Tidd, 9th ed. 98: *Munford v.*

Pait, 1 Sid. 261: *Anon.*, 2 Salk. 506: *Anon.*, 7 Mod. 114).

(*z*) *Sloman v. Aynel*, Fortesc. 320: *Munford v. Pait*, 1 Sid. 261.

(*a*) *Facer v. French*, 5 Dowl. 554.

(*b*) *Jenkins v. Hyde*, 6 M. & Sel. 228.

(*c*) *Doe Lindsay v. Edwards*, 2 Dowl. 471; and see *Facer v. French*, 5 Id. 554.

(*d*) *Weston v. Withers*, 2 T. R. 511: see *Goodtitle v. Mayo*, Tidd, 98.

(*e*) *Brittain v. Greenville*, 2 Str. 1121: *Winter v. Slow*, Id. 878; and see *Butler v. Imneys*, Id. 891: *Blood v. Lee*, 3 Wils. 24.

CHAPTER XIV.

PROCEEDINGS AGAINST TRADERS SUBJECT TO THE BANKRUPT LAWS.

CHAP. XIV.

SINCE the abolition of arrest on mesne process by the 1 & 2 V. c. 110, the committal of an act of bankruptcy by lying in prison on arrest for twenty-one days can seldom occur and apparently as a substitute for that mode of making a debtor bankrupt the 8th section of the act enacts, "that if any single creditor (*f*) or any two or more creditors being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors whose debts shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her majesty's courts of bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

Trader, how compelled to pay, or secure debt, or become bankrupt.

The affidavit under this act must be made by the creditor, and the affidavit of any one on his behalf would not suffice. It may be made by a public officer of a joint-stock banking company. It need not be intitled in any court. It may be sworn before a master extraordinary in Chancery, and filed in the register's office of the Court of Bankruptcy (*g*).

Form of Affidavit.

It has been held that a defendant who has entered into the security required by the above section is in the same situation as if he were at large on bail, and may render even before judgment according to the practice in case of a defendant on bail (*h*).

Render by Defendant in Discharge of Bail.

(*f*) See the form of affidavit, Chit. Forms, 538; and of notice, *Id.*
(*g*) See *Ex parte Hall*, 3 Deac. Rep. 405.

(*h*) *Owston v. Coates*, Q. B. E., 1839; 3 Jurist, 433.

BOOK IV.

PART I.

PROCEEDINGS INCIDENTAL AND COLLATERAL
TO THE ACTION.

CHAPTER I.

ENTRY OF PROCESS ON ROLL TO SAVE THE STATUTE OF
LIMITATIONS.BOOK IV.
PART I.Statute 2 W.
4, c. 32, s. 10,
and Decisions
as to.

THE 2 W. 4, c. 39, s. 10, enacts, "that every writ of summons and *capias*(a) may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith; provided that no *first* writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and *entered of record* within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; such (b) return to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be." This enactment materially alters the former practice, under which it was not necessary to enter any continuances of the second or subsequent writs until the plaintiff replied to the plea of the Statute of Limitations(c). And if the plaintiff

(a) Since 1st October, 1839, all personal actions in the superior courts of law must be commenced by writ of summons. (1 & 2 V. c. 110, s. 2).

(b) In the printed copy of the act, instead of the word "such," the conjunc-

tion "and" is erroneously inserted.

(c) See *Harris v. Woolford*, 6 T. R. 617; *Doe Mears v. Dolman*, 7 Id. 618; *Gregory v. Hurrill*, 1 Bing. 324; 8 Moore, 189, S. C.; *Beardmore v. Rattenbury*, 5 B. & Ald. 452; 1 D. & R. 27, S. C.

declared within a year after suing out the first process (provided he had not been *nonprossed* before that time) continuances were not necessary, and even the first process need not have been returned or filed; though otherwise it must have been so(*d*). The enactment is confined in its operation to cases where it is intended to save the Statute of Limitations: and therefore, where a *capias* was issued against two defendants, one of whom was arrested and put in bail before the expiration of the *four* months which the writ had to run, and the other defendant could not be arrested during that period; the proceedings were holden to be regular, although the first writ had not been returned, nor any continuance entered; and the second writ was not issued within one calendar month after the first had expired(*e*). Where a writ of *summons* tested in time to save the Statute of Limitations was re-sealed in consequence of an alteration in the description of the defendant and the county in which he resided, and was not served until after the *six* years had expired, the court held, that the re-sealing did not amount to a re-issuing of the writ, and that it was not necessary for the plaintiff to show when the re-sealing took place(*f*). But a re-sealed writ must, it seems, be dated of the day on which it is re-sealed(*g*). The court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the Statute of Limitations; but the plaintiff must proceed according to the above provision; namely, either to outlaw the defendant, or else to get the writ returned *non est inventus*, and entered of record within one calendar, &c.(*h*). It seems that, although a writ of *summons* has been allowed to expire, yet the plaintiff may continue it by *alias* and *pluries*, &c., by leave of the court or a judge(*i*). And a *pluries* *summons* may be thus taken out pending a writ of *distringas* not acted upon(*j*).

If you proceed by writ of *summons*, (which, since the act for abolishing arrest on mesne process (1 & 2 V. c. 110) is the only process by which a personal action can be commenced in the superior courts, except in proceeding against insolvents under the 85th section of that act) (*k*), *sue out the writ against the defendant as in ordinary cases* (*l*), *within the time limited for bringing the action*. If the defendant has not been served therewith within four calendar months from its date inclusive, (there is no absolute necessity for any attempt to serve him(*m*)), *then you must, within a calendar month after the expiration* (*n*) *of the writ, inclusive of the day of such expiration, return on the writ "non est inventus"* (*o*); and, *within the same time, get*

Practical Directions as to proceeding by Writ of Summons.

(*d*) *Worley v. Lee*, 2 T. R. 112; *Penny v. Harvey*, 3 Id. 123; *Parsons v. King*, 7 Id. 6; *Stanway v. Perry*, 2 B. & P. 157. As to the mode of saving the statute in ejectment, see *ante*, 732; *Farrelain v. Shackleton*, 5 Burr. 2604.

(*e*) *Nicholson v. Rowe & Leman*, 2 C. & M. 469; 2 Dowl. 296; 4 Tyr. R. 308, S. C.

(*f*) *Brathwaite v. Lord Montford*, 2 C. & M. 408; 4 Tyr. R. 276, S. C.

(*g*) *Knight v. Warren*, 7 Dowl. 663.

(*h*) *Frith v. Lord Donegal*, 2 Dowl. 527.

(*i*) *Norman v. Winter*, 7 Dowl. 304; 5

Bing. N. C. 279, S. C.

(*j*) *Id.*

(*k*) See *Turner v. Darnell*, 7 Dowl. 346.

(*l*) *Ante*, Vol. I. 112.

(*m*) *Williams v. Roberts*, 3 Dowl. 512; 1 Gale, 56; 1 C., M. & R. 676; 5 Tyr. 421, S. C.: but without it perhaps the costs of the writ would not be allowed to the plaintiff. (*Id.*)

(*n*) The writ expires in four calendar months after its date, inclusive of such date.

(*o*) See form, Chit. Forms, 539.

a roll from the person appointed to deliver out the rolls of the court, or it may be had at any stationer's. Engross the writ on this roll, and also enter the writ and return, with the award of an alias writ of summons (p). In making the engrossment, leave a margin of an inch at least, and a space at bottom to prevent the writing being rubbed out, writing upon both sides, if necessary. Make out a docket-paper (p). Take the writ, roll, and docket-paper to one of the masters, and docket the entry, and he will mark the writ. Then, carry in the roll to the treasury of the court, and file the writ with the master. After this, and within one calendar month after the expiration of the first writ of summons, inclusive of the day of such expiration, sue out an alias writ of summons against the defendant, as in ordinary cases (q). Indorse on or subscribe to this alias writ, a memorandum specifying the day of the date of the first writ (r). If the defendant has not been served with this alias writ within four calendar months from its date inclusive, then you must, within a calendar month after the expiration of the alias writ, inclusive of the day of such expiration, return on such writ "non est inventus;" and within the same time, enter on the roll, containing the entry of the first writ, this alias writ and return thereon, together with the award of a pluries. Take the draft of the entry to one of the masters, who will make the entry on the roll; pay him for the entry. File the writ with him. After this, and within one calendar month after the expiration of the alias writ of summons, inclusive of the day of such expiration, sue out a pluries writ of summons against the defendant, as in ordinary cases (s). Indorse on, or subscribe to this pluries writ a memorandum specifying the day of the date of the first writ. If the defendant has not been served with this pluries writ within four calendar months from its date inclusive, then you must, within a calendar month after the expiration of the pluries writ, inclusive of the day of such expiration, return on such writ "non est inventus;" and within the same time, enter on the roll, containing the entry of the first writ, this pluries writ and return thereon, together with the award of a pluries (t). Take the draft of the entry to one of the masters, who will make the entry on the roll; pay him for the entry. File the pluries writ with the master. After this, proceed by other pluries writs of summons, and get them issued, returned, and filed in the same manner, until the defendant has been served therewith, or until you have obtained his appearance under a writ of distringas, or have outlawed him. It would seem, that the writ issued in the continuation of a preceding writ, must not be issued until the preceding writ be returned and filed; for no writ can be continued unless it be first returned and filed, the court, until that time, having no consance of the action, so as to enable them to award an alias, &c. (u). Care must be taken that the writ upon which the defendant is ultimately brought before the court, be of the same species with that originally sued out and entered on the roll, as above mentioned, and that the continuances correspond

(q) See form. Chit. Forms, 540.

(q) *Ante*, 117.

(r) See form, Chit. Forms, 540.

(s) *Ante*, 117.

(t) See the form, Chit. Forms, 540.

(u) See *Gregory v. Des Anges*, 5 Dowl.193; *Welden v. Greg*, 1 Tidd, 60; *Vincent's case*, Comb. 346; *Attwood v. Burr*, 7 Mod. 5; and in *Norman v. Winter*, 7 Dowl. 304; 5 Bing. N. C. 279, S. C., where the question was raised, but not adjudicated upon.

with both. If the first writ be a summons, all the continued writs issued must, it seems, be also *alias* or *pluries* writs of summons, and not writs of *capias*, and so *vice versa* (*x*). We have seen (*ante*, Vol. I. 399) that continuances of mesne process, and of writs of execution, differ materially in this respect. A *distringas*, with a view to outlawry, may, however, issue in continuation of writs of summons, *alias*, &c., previously sued out to save the Statute of Limitations (*y*). The court may, it seems, allow an amendment of the *continuances* entered (*z*), but not, it seems, of the writ itself (*a*). The expense of such of the writs as are unnecessarily issued will not be allowed to the plaintiff (*b*).

If you proceed by writ of *capias*, issued before the 1 & 2 V. c. 110, took effect, [1st Oct. 1839], *nearly the same practical observations above made, as to proceeding by writ of summons, will be applicable, except that you take the writs of capias to the sheriff's office, and get him or his successor in office to return "non est inventus" (c)*. It would seem, that if a *capias* issued before the act expires, after its commencement, the proceedings may and should be continued by an *alias capias*. All personal actions commenced since that statute, whether to save the Statute of Limitations, or otherwise, must be by writ of summons (*d*): except, indeed, in case of proceeding against an insolvent, under the 85th section of the 1 & 2 V. c. 110 (*e*).

If a suit be commenced in an *inferior court* in due time, and it be afterwards removed into one of the superior courts by *habeas corpus*, &c., and the plaintiff declare there *de novo*, and the defendant plead the Statute of Limitations, the plaintiff may reply, and shew the *plaint* or commencement of the suit in the inferior court, and that will be sufficient to avoid the statute (*f*).

(*x*) *Smith v. Bower*, 3 T. R. 662: and see, as to what writs were formerly considered good *continuances* of the preceding one, *Beadmore v. Rattenbury*, 5 B. & Ald. 452; 1 D. & R. 27, S. C.: *Page v. Newman*, 8 B. & C. 489; 2 M. & R. 528, S. C.: *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25, S. C., and cases there cited: *French v. Mauwood*, 2 Dowl. 265. In Mr. Tidd's work on the *Uniformity of Process Act*, p. 60, there is a form of entry of a *distringas*, as a mode of *continuing* a writ of summons. (See *Ray v. Dow*, 5 Dowl. 310).

(*y*) *Ray v. Dow*, 5 Dowl. 310.

(*z*) See *Taylor v. Gregory*, 2 B. & Ad. 257.

(*a*) See *ante*, Vol. I. 120. A writ returnable on a general return day, instead

of a day certain, was formerly held sufficient to save the statute. (*Leadbiter v. Markland*, 2 Bla. Rep. 1131: and see *Karrer v. James*, Willes, 255; *Smith v. Bower*, 3 T. R. 662).

(*b*) *Williams v. Roberts*, 3 Dowl. 512.

(*c*) See forms of entries, &c., of writs of *capias*, Chit. Forms, 542 to 544.

(*d*) 1 & 2 V. c. 110, s. 2.

(*e*) See *Turnor v. Darnell*, 7 Dowl. 346.

(*f*) Tidd, 9th ed. 27, 28. It will be observed that the *Uniformity of Process Act* does not extend to any cause removed into either of the superior courts by writ of *pone*, *certiorari*, *recordari*, *facias loquelum*, *habeas corpus*, or otherwise. (2 W. 4, c. 39, s. 19: and see *Dod v. Grant*, 6 Nev. & M. 70).

As to proceeding by *Capias*, under 2 W. 4, c. 39.

In inferior Court.

CHAPTER II.

OUTLAWRY.

- SECT. 1. *Upon Mesne Process*—926 to 934.
 2. *Upon Final Process*—934, 935.
 3. *Reversal of Outlawry*—935 to 940.

SECT. 1.

Outlawry upon Mesne Process.

What, and in what Cases, 926.
Writ and Process, 927.
Exigi Facias, Writ of Proclamation, &c., 928.
Appearance, &c., 930.
The Judgment of Outlawry, id.

Capias Utlagatum, &c., 931.
Special Capias Utlagatum, &c., 932.
Declaration after Outlawry, 934.

BOOK IV.
PART I.

What, and in
what Cases.

What, and in what Cases.] OUTLAWRY is a punishment inflicted by law, for a contempt in avoiding the execution of the process of the queen's court: the party outlawed is to be imprisoned if he can be found; he forfeits to the crown (*a*) his personal chattels presently, and his real chattels and the profits of his lands immediately upon office found; and he is incapacitated from suing in his own right, from serving on juries, &c., from appearing in court for any other purpose than either to reverse his outlawry (*b*), or to protect himself from a wrongful action or proceeding (*c*), or to obtain his discharge under the Insolvent Debtors' Act (*d*), or as a witness (*e*), for which purpose his competency is not destroyed. But, by outlawry in personal actions, the party does not forfeit any freehold lands, nor a rent-charge for life, nor arrears which accrue for the rent during his life; nor are copyholds liable to be seized (*f*). Indeed, in civil actions, outlawry is rather in the nature of process to compel the defendant to submit to the jurisdiction of the court: if outlawed upon mesne process, he may, upon putting in and perfecting bail, or entering an appearance, reverse the outlawry as of course; if upon final process, he may reverse the outlawry, upon payment of the debt and costs.

(a) See *Rex v. Cooke*, 1 M'Clel. & Y. 196; *Tisdall v. Bennett*, 1 Jones, Rep. Exch. Ir. 492.

(b) *Aldridge v. Buller*, 2 M. & W. 412; 5 Dowl. 733, S. C.: in which it was held, that he cannot sue out a *habeas corpus ad satisfaciendum* in order to charge a plaintiff in execution, against whom he has obtained judgment as in case of a nonsuit;

although his outlawry was at the suit of a different plaintiff.

(c) *Hall v. Hawkins*, Rolls Court, 1839, per Parke, B., 2 M. & W. 412.

(d) *R. v. Insolvent Court*, 3 Nev. & P. 543.

(e) See Co. Lit. 6. b.

(f) Com. Dig. Utlagary, D. 3.

Outlawry may be adopted against men above the age of twelve years(*g*), and against woman of any age; in which latter case, the defendant is said to be "waived," not outlawed(*h*). In an action against husband and wife, the husband may be outlawed, and the wife waived(*i*).

CHAP. II.
SECT. 1.
Who may be
Outlawed.

Writ and Process.] Formerly, the action must have been commenced by *original writ*, otherwise process of outlawry would not lie, either upon mesne or final process(*k*). But by the 2 *W.* 4, c. 39, the action must (before the 1 & 2 *V.* c. 110) have been commenced either by writ of *capias*, under the 2 *W.* 4, c. 39, or writ of *summons* and *distringas* thereon; and sect. 5 of that act enacts, "that upon the return of *non est inventus* (*l*), as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas*, as hereinbefore mentioned, shall have issued, (whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons), it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writ of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum*, issued after an original writ. Provided always, that every such writ of exigent* proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear *teste* on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear *teste* on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than *fifteen days* after the delivery thereof to the sheriff or other officer to whom the same shall be directed." Also, by section 6 of the same act, outlawry or waiver may be obtained on *final process* in an action commenced by *capias* or *summons*. Now, however, since the 1 & 2 *V.* c. 110, s. 2, every personal action must be commenced by writ of *summons*, and consequently the provisions as to outlawry on writ of *capias*, apply only to actions commenced before the 1st October, 1838, when that act came into force.

Writ and
Process.

Sic.

As all personal actions in the superior courts of law must now be commenced by writ of *summons*(*m*), except in the case of insolvents arrested or detained under the 1 & 2 *V.* c. 110, s. 85, in which it is very improbable that the plaintiff

(*g*) Co. Lit. 128. a.

(*h*) Id. 122. b.

(*i*) See Tidd's Supplement, 63, and cases and practice there noticed.

(*k*) *Crew v. Bails*, 1 Leon. 329: see *Edwards v. Carter*, 1 Str. 473: *Gent v. Abbott*, 8 Taunt. 187.

(*l*) Such a return must be made previously to issuing the *exigi facias*. (See

Gregory v. Des Anges, 5 Dowl. 193; 3 Bing. N. C. 85). It is no objection that the writ of *capias* appears to have been returned *non est inventus* before the four months expired, it being so done by order of a judge, which need not be noticed on the writ. (*Lewis v. Davison*, 1 C., M. & R. 655, 658; 3 Dowl. 272, 274, S. C.)

(*m*) 1 & 2 *V.* c. 110, s. 2.

should be in a situation to proceed to outlawry, or would do so if he could (*n*), and as the arrest under the 1 & 2 *V. c.* 110, s. 3, is merely collateral to the action, the mode of proceeding to outlawry, on mesne process is by summons and *distringas*, as follows: *viz.*—*Prepare and sue out a writ of summons, as in ordinary cases, and in the manner pointed out ante, Vol. I. 112. You must afterwards obtain an order of the court or of a judge, for a writ of distringas, as directed ante, Vol. I. 126; and if leave to issue it be granted, issue it accordingly, in the form, and according to the practice, as directed ante, Vol. I. 128.* After suing out a *distringas*, with a notice that the object of it is to compel an appearance, the plaintiff cannot treat it as a preliminary to outlawry (*o*). The *distringas* should be directed to the sheriff of the county in which you intend that the defendant should be outlawed. In London the defendant may be exacted every fortnight, in other counties every month. It is therefore usual to outlaw defendants in London for expedition sake. It was held, that there was no objection to the old process by *capias* being issued into a court different from that in which the defendant was described as being resident (*p*). *Take the writ of distringas to the sheriff's office, and leave it there fifteen days, at least, before the return day, and, at the expiration of that time, get him to return it "non est inventus and nulla bona."* It is, it seems, questionable whether the sheriff's return of *non est inventus and nulla bona*, to a *distringas*, issued with a view to proceedings to outlawry, dispenses with the necessity of leaving a copy of the writ at the defendant's place of abode, as required by the 3rd sect. of the 2 *W. 4, c.* 39 (*q*); and where a copy can be so left, it is best to leave it. A *distringas* for the purpose of proceeding to outlawry may issue after a writ of summons which has been continued by *alias* or *pluries* writs, sued out to save the Statute of Limitations (*r*). *Leave the writ and return with one of the masters, who will make out the exigi facias and writ of proclamation.*

Exigi Facias. *Exigi Facias. Writ of Proclamation, &c.*] The *exigi facias* is a judicial writ, commanding the sheriff to demand the defendant from county court to county court, until he be outlawed; or, if he appear, then to take and have him before the court on a day certain in term, to answer to the plaintiff in an action of &c. (*s*). It must be tested on the day of the return of the *distringas*, whether in term or vacation (*t*). It must be returnable in the same or the following term, on a day certain, and must have fifteen days at least between the *teste* and return (*u*); and, if possible, you should regulate the return day so that five hustings in London, or county courts elsewhere, may be held between the *teste* and return of the writ, in order to save the expense of an *allocatur exigent*; for the *exigent* shall have such a return as that five county courts

(*n*) See the observations in Vol. I. p. 134, as to proceeding against insolvents.

(*o*) *Vere v. Gowar*, 3 Bing. N. C. 508; 4 Scott, 287; 5 Dowl. 494, S. C.

(*p*) *Morris v. Davies*, 4 Dowl. 317; 1 H. & W. 513, S. C.

(*q*) *Vere v. Gowar*, 4 Scott, 287.

(*r*) *Reay v. Joude*, 2 M. & W. 188; 5 Dowl. 310, S. C.

(*s*) See the form, Chit. Forms, 545, 546, and the notes there.

(*t*) See *Vere v. Gowar*, 4 Scott, 287; Tidd, New Pract. 93.

(*u*) 2 W. 4, c. 39, s. 5, *ante*, 927.

may intervene between the *teste* and return (*x*). The 12th sect. of the 2 W. 4, c. 39, which requires writs issued under that act to bear date on the day on which they issued, &c., and to be indorsed with the name and abode of the attorney or party suing out the same, does not apply to writs of *exigent* (*y*). *Get this writ signed by one of the masters, and sealed by the sealer of the writs.* If the defendant be imprisoned, or beyond sea, at the time of the *exigent* awarded, or after the *teste*, and before or at its return, the court will reverse the outlawry (*z*). But the court would not reverse the outlawry merely on the ground of the defendant having constantly appeared in public during the proceedings against him, unless, perhaps, he swore that he had no notice of them (*a*), or that the plaintiff might easily have found him, so as to have served him with process, and that is not denied by plaintiff (*b*).

The writ of *proclamation* recites the *exigi facias*, and requires the sheriff to make three proclamations, in pursuance of stat. 31 El. c. 3, and 7 W. 4 & 1 Vict. c. 45, s. 2 (*c*). It should be directed to the sheriff of the county where the defendant shall be actually dwelling at the time of the *exigent* awarded (*d*); otherwise the court will reverse the outlawry (*e*); but in practice it is usual to direct it to the same sheriff the *exigi facias* and other writs were directed to; if directed to a different sheriff, it is called a writ of "*foreign proclamation*" (*f*). A writ directing the proclamation to be made at the parish church is sufficient, though the 31 Eliz. c. 3, says "nearest church or chapel" (*g*). It must be tested and returnable the same as the *exigi facias* (*h*). *Get it signed by one of the masters, and sealed by the sealer of the writs.* Unless this writ be regularly sued out and returned (*i*) according to the directions of the statute, the outlawry will be void, and may be reversed (*k*).

Writ of Proclamation.

Take these writs to the officers of the sheriffs, to whom they are directed, respectively, and they will be executed. The *exigi facias* is executed, by exacting the defendant at five successive county courts, or in London at five successive hustings, unless before that time the defendant appear or put in bail, &c.; and the writ must be actually in the sheriff's possession at the time the defendant is demanded (*l*). The writ of *proclamation* is executed by making three proclamations; one in the county court or hustings; one at the general quarter sessions; and one other of these proclamations to be made one month at least before the *quinto exactus*, on a Sunday, immediately after divine service and sermon, at or near the usual door of the nearest church or chapel of the town or parish where the defendant was dwelling (*m*) at the time of the awarding of the *exigent* (*n*); or by affixing a written or printed or partly written

How executed.

- (*x*) Com. Dig., Pleader, 2 W. 4.
(*y*) *Lewis v. Davison*, 3 Dowl. 272; 4 Moo. & P., 523.
(*z*) Post, 935.
(*a*) *Johnson v. Drizer*, 1 Dowl. 127.
(*b*) See *James v. Jenkins*, 9 Moore, 589; *Biscoe v. Kennedy*, 2 Wils. 127.
(*c*) See the form, Chit. Forms, 547.
(*d*) 31 El. c. 3, s. 1.
(*e*) *Rayer v. Cooke*, 3 B. & C. 529; 5 D. & R. 302, S. C.
(*f*) See the form, Chit. Forms, 547.
(*g*) *Lewis v. Davison*, 3 Dowl. 272; 1 C., M. & R. 655, S. C.; 4 Moo. & P. 523.
(*h*) 31 El. c. 3, s. 1: 2 W. 4, c. 39, s. 5, ante, 927.
(*i*) See form of return, Chit. Forms, 531.
(*k*) 31 El. c. 3, s. 1: see *Rer v. Yandell*, 4 T. R. 521; *Volet v. Waters*, 3 D. & R. 55; *Rayer v. Cook*, 5 Id. 302; 3 B. & C. 529, S. C.
(*l*) *Volet v. Waters*, 3 D. & R. 55: post, 930.
(*m*) See *Lewis v. Davison*, 3 Dowl. 272; 4 Moo. & P. 523.
(*n*) 31 El. c. 3, s. 1.

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PART I.

and partly printed notice of such proclamation on or near to the doors of all the churches and chapels within such town or parish, previously to the commencement of divine service (o). Where one month had not elapsed between the proclamation at the church door and the *quinto exactus*, the court reversed the outlawry (p).

Allocatur
Exigent.

If you find by the sheriff's return (q) to the writ of *exigent* that there have not been five county courts or hustings between the *teste* and return of it, *sue out with one of the masters another writ, called an "allocatur exigent" (r), and leave it with the sheriff, as above directed, who will thereupon exact the defendant at the next and subsequent county courts or hustings, so as to make the number of county courts or hustings at which the defendant has been demanded upon both writs, five.* If upon this writ the defendant be not demanded the requisite number of times, you may sue out another writ of *allocatur exigent*, and have it executed in the same manner.

Exigent must
be executed
at five suc-
cessive Courts.

The defendant must be exacted upon these several writs, at five successive county courts or hustings; for if any county court or husting have intervened, the several writs of *exigent* &c., already executed are without effect, and you must sue out an *exigi facias* and writ of proclamation *de novo* (s).

Appearance,
&c.

Appearance, &c.] If, before the return of the *exigent*, the defendant wish to appear voluntarily, then, *let him enter an appearance with one of the masters of the term in which the exigent issued, as directed Vol. I. 121 (t), who will thereupon make out a supersedeas; or you may make out a supersedeas yourself (u), upon getting a note of particulars of the exigent from the master, and get him to sign it. Get it sealed by the sealer of the writs. Leave it at the sheriff's office before the return of the exigent, and he will thereupon cease to execute the latter writ, and make a return to it accordingly (x).* The suing out of the *supersedeas* is, it seems, deemed equivalent to entering a common appearance, and therefore a common appearance is rarely actually entered in such a case (y).

Bail on Exi-
gent.

If the defendant be arrested on the *exigent*, he must enter an appearance, and sue out a *supersedeas*, as above directed, or give bail to the sheriff, as in ordinary cases, or remain in custody.

The Judg-
ment of Out-
lawry.

The Judgment of Outlawry.] If the defendant be not arrested on the *exigent*, nor appear voluntarily, as above mentioned, then, after being exacted five times, and proclaimed thrice, he is outlawed. The writ of *exigent* is then returned, with the five exactions thereon stated, with certainty as to time, place, &c., together with the judgment of outlawry, by the coroner, or in London by the recorder (z). The writ of proclamation must also be returned. *File the writ of proclamation with one of the masters, and take the writ of exigent and return to him, and he will make out the capias utlagatum.*

(o) 7 W. 4 & 1 V. c. 45, s. 2.

(p) *Taylor v. Waters*, 3 D. & R. 575; 2 B. & C. 353, S. C.

(q) See the form, Chit. Forms, 546.

(r) Ibid.

(s) 2 Sellon, 285; see *Stowel v. Lord Zouch*, 1 Plowd. 371; *Whitwick v. Hoven-*
den, 3 Lev. 245.

(t) See form, Chit. Forms, 548.

(u) Ibid.

(x) See form of return, Chit. Forms, 549

(y) See *Peach v. Wadland*, Barnes, 319.(z) See *Rex v. Almon*, 5 T. R. 202; *Rex v. Yandell*, 4 Id. 521; *Reynolds v. Adams*, 3 T. R. 578.

Capias Utlagatum, &c.] The *capias utlagatum* is general or special; the former against the person only, the latter against the person, lands, and goods. The general writ of *capias utlagatum* commands the sheriff to take the defendant, so that he have him before the court on a day certain (*a*), to do and receive what the court shall consider of him (*b*). Upon filing the writ of proclamation, and taking the *exigent* and return to the officer as already mentioned, he will make out the *capias utlagatum*. *Get it signed by one of the masters, and sealed.* Both this and the special writ may issue into any county, at the option of the plaintiff, without being *testatum* writs (*c*).

CHAP. II.
SECT. 1.
Capias Utla-
gatum, &c.

When the defendant has been arrested on the *capias utlagatum*, in an action commenced by writ of summons, the sheriff shall discharge him, upon an attorney's undertaking in writing to appear for the defendant and reverse the outlawry (*d*). Or if the action were commenced by writ of *capias* under 2 W. 4, c. 39, the sheriff shall discharge him, upon his giving a bond, with two sufficient sureties, for double the sum for which special bail is required, conditioned for his appearance by attorney at the return of the writ, or if given after the return, then for his appearance at some return in the following term (*e*), to reverse the outlawry, and to do and perform such other things, as shall be required by the said court (*f*). The sheriff is bound to take the bond above mentioned, in bailable actions, whether there be any sum indorsed on the *capias utlagatum* or not (*g*). As to the terms on which the outlawry will be reversed by the court on motion, see *post*, 935.

Discharge
from Custody
on.

It has been held, that a bankrupt who has been outlawed, and his person arrested, and goods taken by the sheriff, under a *capias utlagatum*, is not entitled to be relieved, on summary motion, from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance; for, until those terms are complied with, he has no *locus standi in judicio* (*h*). But during the forty-two days allowed for the examination of the bankrupt under the 117th section of the 6 G. 4, c. 16, the bankrupt cannot be arrested under the *capias utlagatum*; and, if he be, the Court of Bankruptcy will discharge him (*i*). It seems that bankruptcy and certificate are no ground of discharge of a prisoner in custody on *capias utlagatum* (*k*). And in a recent case it was decided, that a party outlawed on civil process after judgment, and, on his petition subsequently made to the Insolvent Debtors' Court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlawry is founded be included in his schedule (*l*). A prisoner in custody on a *capias utlagatum* for non-payment of damages and costs may, however, be dis-

Discharge in
case of Bank-
ruptcy and
Insolvency.

(*a*) 2 W. 4, c. 39, s. 5, *ante*, 927.
(*b*) See the form, Chit. Forms, 549;
the like to a county palatine, Id.
(*c*) *Anon.*, 1 Vent. 33; Gilb. C. B. 17.
(*d*) 4 & 5 W. & M. c. 18, s. 4.
(*e*) Id. s. 5.
(*f*) Id. s. 4.
(*g*) *Cracraft v. Gledowe*, 3 Burr. 1482.
(*h*) *Summervil v. Watkins*, 14 East, 536:

and see *Loukes v. Holbeche*, 1 Moo. & P. 126.
(*i*) *Ex p. Hemsley*, Jan. 1832, Court of Review, 1 Deac. & Chit. Rep. 16.
(*k*) *Beauchamp v. Tomkins*, 3 Taunt. 141.
(*l*) *Dickson v. Baker*, 1 A. & E. 853; 3 Nev. & M. 775, S. C.: but see *Adcock v. Fisk*, C. P., November 5, 1839.

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charged under the Insolvent Debtors' Act, without previous reversal of his outlawry(m).

Special Capias
Utlagatum,
&c.

Special Capias Utlagatum, &c.] The special *capias utlagatum*, like the general writ, commands the sheriff to take the defendant; and thus far it is executed, and the defendant is discharged, upon an attorney's undertaking or upon giving a bond to the sheriff, in the same manner as when the writ is general. But the special writ also commands the sheriff to inquire, by a jury, of the defendant's goods and lands, to extend and appraise the same, and to take them into the queen's hands and safely keep them, so that he may answer to the queen for the value and issues of the same(n). *Get this writ signed by one of the masters, and sealed.* As the inquiry and extent in this case, however, are merely to compel the appearance of the defendant, if he be arrested, and give the undertaking or bond above mentioned, before this part of the writ be executed, it would be very harsh proceeding to inquire of and extend his property afterwards, and, I believe, is never done. But, if he have not been arrested, or have not given the undertaking or bond above mentioned, or have not appeared or put in bail to the original action, the sheriff must summon a jury to inquire of the defendant's property, real and personal, in possession and in action, and to appraise the same; and you may subpœna witnesses before the inquest, to prove the defendant's interest in the property, and its value. As soon as the inquest is taken, the sheriff takes possession of the property found by it, and returns the *special capias utlagatum*, annexing thereto the inquisition(o). *Get the writ and return from the sheriff, and get it filed with one of the masters(p), who will give you a transcript of it for the Exchequer.* As to the sheriff's right to poundage, upon executing this writ, see *Graham v. Grill*, 2 M. & Sel. 294; and as to a landlord's right to his rent, where goods, &c., are thus taken on a *capias utlagatum*, see *St. John's College v. Murcott*, 7 T. R., 259. The court will not, on the 4 & 5 W. & M. c. 18, ss. 4, 5, restore goods taken on a special *capias utlagatum(q)*.

Proceedings
to obtain Satis-
faction out
of the Pro-
perty seized.

If the defendant have not as yet appeared or put in bail, and there be no probability of his doing so, you may proceed to obtain satisfaction for your debt and costs out of the property thus seized. For this purpose, *take the transcript the master has given you to your clerk in court(r) in the Exchequer, who, after giving a rule for persons to come in and claim the property seized, will upon the expiration of that rule make out for you a venditioni exponas commanding the sheriff to sell the goods(s), a levam facias to levy the issues and profits of the freehold land(t), and a scire facias to recover debts due to the defendant(u), if necessary. Take these writs (or such of them*

(m) *R. v. Insolvent Court*, 3 Nev. & P. 543; see *Adcock v. Fisk*, C. P., Nov. 5, 1839. The party cannot afterwards be charged in execution on the judgment of outlawry. (Id.)

(n) See the form, Chit. Forms, 549.

(o) See the form of the return, and of the inquisition, Chit. Forms, 550.

(p) *Reynolds v. Adams*, 3 T. R. 578.

(q) *Anon.*, 1 Tidd, 133.

(r) In all matters connected with the queen's revenue, or which involve revenue

rights and questions, the sworn and side-clerks have still the exclusive privilege of practice. (Price, Exch. 12: *In re Otto Manners*, 7 Dowl. 516).

(s) See a form, Chit. Forms, 551.

(t) Id. 552.

(u) See Gilb. C. B. 16: *Alworth v. Hutchinson*, 1 Lutw. 334. Where plaintiff in an action was outlawed in another action, proceedings were stayed on defendant's paying the money recovered into court; for if he paid it to the plaintiff

as you may think proper to sue out) to the sheriff, who will thereupon sell the goods, levy the issues, or summon the parties on the scire facias, as thereby directed. If to a special *capias utlagatum* the sheriff return an inquisition finding that the defendant had benefices, but no lay fee, the court will award a writ of sequestration on reading the transcript of the outlawry and inquisition(*x*). But where to a *capias utlagatum* the sheriff returned that the defendant had no goods nor any lay fee within his bailiwick, but that he was a beneficed clergyman, without stating the name or situation of the benefice, the court refused a writ of sequestration, but suggested a motion for a rule, calling upon the sheriff to amend his return(*y*).

When the goods have been sold, &c., by the process above pointed out, if the amount do not exceed the sum of 50*l.*, *more the Court of Eschequer that it be paid to you, and an order will be granted accordingly. Your clerk in court will thereupon draw up the order*(*z*), *and also a subpoena requiring the sheriff to pay you the money*(*a*); *and the sheriff being served therewith, will pay you the amount mentioned in the return to the venditioni exponas, deducting his poundage.*

Where the Amount does not exceed 50*l.*

But if the money in the sheriff's hands exceed the sum of 50*l.*, *then petition*(*b*) *the lords of the treasury that it may be paid over to you, who will thereupon refer it to the solicitor of the treasury*(*c*). *Get a certificate of the proceedings upon the outlawry from your clerk in court*(*c*); *make an affidavit of the debt and costs before a judge at chambers*(*d*); *and leave these, together with your attorney's bill, and the venditioni exponas and return, before the solicitor of the treasury, who will thereupon make his report*(*e*). *File this report with the clerk of the treasury; and a warrant will then be issued, directing the attorney-general to consent to an order*(*f*); *which being taken to the attorney-general, he will give his consent of course. Then more the court, and get the order and subpoena from your clerk in court, as above mentioned; and the sheriff, upon being served with the order &c., will pay you the money.* This proceeding usually costs from 20*l.* to 25*l.* This warrant, and the attorney-general's consent for the payment of the money in the hands of the sheriff, under the *capias utlagatum*, do not amount to an appropriation of that money, where they are granted in ignorance of the death of the defendant; and the court, on a plea by the representatives suggesting the death, will stay the making of an order for the payment until the fact of the death is determined on an issue taken on the plea(*g*).

Where the Amount exceeds 50*l.*

In the same manner, if your debt be considerable, and the chattel property not sufficient to satisfy it, you may obtain a lease or grant of the queen's right to levy the issues of the defendant's freehold lands, by petition to the lords of the

Grant of Debtor's Lands, &c.

after knowing of the outlawry, he might be liable to pay it over again to the crown. (*Grant v. Bryant*, 6 M. & Sel. 347).

(*x*) *Rex v. Hind*, 1 Dowl. 286; 1 C. & J. 389; 1 Tyrw. 347, S. C.; *Rex v. Armstrong*, 3 Dowl. 760; 2 C., M. & R. 205;

5 Tyr. 752, S. C.

(*y*) *R. v. Powell*, 1 M. & W. 321.

(*z*) See a form, Chit. Forms, 556.

(*a*) Id. 556.

(*b*) Id. 552.

(*c*) Id. 554.

(*d*) Id. 555. A judge of any court will answer. (See 1 V. c. 56).

(*e*) See a form, Chit. Forms, 555.

(*f*) Id. 555.

(*g*) *Rex v. Buchanan*, 1 C. & M. 195.

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treasury(*h*). A warrant will thereupon be granted for the lease, and the lease be made out at the Pipe-office of the Court of Exchequer(*i*).

Declaration
after Out-
lawry.

Declaration after Outlawry.] If the defendant enter an appearance, or put in and perfect bail, before he is outlawed, as mentioned *ante*, 930, the plaintiff may declare against him as in ordinary cases. And the same in ordinary cases where he puts in and perfects bail, or enters a common appearance to the action on reversing the outlawry for any other cause except for want of proclamation under 31 *Eliz. c. 3, s. 3*(*k*). Upon reversing the outlawry for want of proclamation under 31 *Eliz. c. 3, s. 3*, however, the defendant appears to a new action to be brought against him by the plaintiff for the same cause; and the plaintiff has until the end of the second term next after the reversal of the outlawry to declare against him(*l*). After that time, in a case under 31 *Eliz. c. 3, s. 3*, the defendant may refuse to receive a declaration; in which case his bail are discharged, and the plaintiff will be obliged to sue out new process against him.

Venue.

If the plaintiff declare in time, he is not obliged to lay his *venue* in the county into which the summons or *capias* issued; but may lay it in any other county, at his pleasure(*m*).

Where there
are several
Defendants.

Where there are two defendants, and one only has appeared or is in custody, then, after proceeding to outlawry against the other, you may declare against the one who has appeared, alone, stating the outlawry of the other in the commencement of your declaration(*n*). In such declaration you must state that the co-defendant was outlawed in the particular suit: stating that he was "in due manner" outlawed would not suffice(*o*). There is no occasion to refer to the record of outlawry(*p*). The declaration must be intitled to appear on the face of it to have been filed or delivered some day subsequent to the outlawry(*q*).

SECT. 2.

Outlawry upon Final Process.

On what Pro-
cess.

IF the action were commenced by writ of summons or *capias*, under 2 *W. 4, c. 39*(*r*), then if *non est inventus* be

(*h*) See form of petition, Chit. Forms, 553.

(*i*) 2 Sellon, 290 to 292.

(*k*) See *Hesse v. Wood*, 4 Taunt. 691.

(*l*) 31 *El. c. 3, s. 3*.

(*m*) *R. H.*, 2 *W. 4, r. 40*: *Whitwick v. Hovenden*, 3 *Lev. 245*. See form of judgment of *nonpro*s for not declaring after defendant's appearance on the *exigi facias*, Chit. Forms, 557.

(*n*) See form, Chit. Forms, 557: *Haigh v. Conway*, 15 *East, 1*: *Goldsmith v. Levy*, 4 Taunt. 299: *ante*, 852, n. (*c*), and Vol. I. p. 138: and see *Fort v. Oliver*, 1 *M. & Sel. 242*.

(*o*) *Saunderson v. Hudson*, 3 *East, 144*: *Haigh v. Conway*, 15 *East, 1*.

(*p*) *Macmichael v. Johnson*, 7 *East, 50*.

(*q*) See *Ghent v. Abbott*, 8 Taunt. 187; 2 *Moore, 87, S. C.*

(*r*) 2 *W. 4, c. 39, s. 6*. The following are the words of that enactment:—"After judgment given in any action commenced by writ of *summons* or *capias*, under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner, and in such cases, as may now be lawfully done after judgment, in an action commenced by *original writ*;

returned to the *ca. sa.*, you may (without suing an *alias* or *pluries ca. sa.*) sue out an *exigi facias*, as directed *ante*, 928, and upon the return thereof sue out a *capias utlagatum*, general or special, as directed *ante*, 931, 932 (*s*). A writ of proclamation is not necessary in this case.

If the defendant be arrested on the *capias utlagatum*, he must remain in custody until he have reversed the outlawry (*t*). If his property have been taken under a special *capias utlagatum*, you may proceed to get the produce of it paid over to you in satisfaction of your debt and costs, as directed *ante*, 932, 933.

Proceedings
on Capias Ut-
lagatum.

After error brought, you cannot proceed to outlaw the defendant on the judgment (*u*). After Error.

SECT. 3.

Reversal, &c., of Outlawry.

THE defendant may be relieved from the outlawry, either by reversing it, or by obtaining the queen's pardon. Reversal, &c., of Outlawry.

There are two modes of reversing a judgment of outlawry; upon application to the court or a judge at chambers, or by writ of error *coram nobis*. The latter, however, is seldom or ever resorted to in practice, being much more expensive and dilatory than the former; for the court on motion, or a judge on summons, will now reverse an outlawry for error in fact not appearing on the face of the record. Both modes of proceeding will now be considered; and first, as to— How effected.

Reversal of on Application to the Court or a Judge.] Reversal of outlawry, on motion, is discretionary with the court; there is no act of parliament which gives a party a right to reverse his outlawry, unless there be error in the proceedings, and then only by writ of error. The court or a judge at chambers will, however, reverse the outlawry, as a matter of course, either unconditionally, or on compliance, by the defendant, with certain equitable terms, according to the circumstances of the case. And, they will reverse it in this summary way for any defect which would be a ground for reversal on a writ of error, though not appearing on the face of the record, (such as that the defendant was in prison (*x*), or beyond sea, at the time of the *exigent* awarded (*y*); and this, though he purposely went abroad to avoid the outlawry or his creditors (*y*)), as well as for defects or

Reversal of
on Applica-
tion to the
Court or a
Judge.

provided always, that every outlawry or waiver had under the authority of this Act, shall and may be vacated or set aside by writ of error or motion, in like manner as outlawry or waiver, founded on an original writ, may now be vacated or set aside."

(*s*) See as to the forms, Chit. Forms, 549.

(*t*) See *Rex v. Wilkes*, 4 Burr. 2539, 2540.

(*u*) *Spinks v. Bird*, Pr. Reg. 184; Barnes 434, S. C.

(*x*) *Beauchamp v. Tomkins*, 3 Taunt. 141; *Hely v. Hewson*, Barnes, 321; *James v. Jenkins*, 9 Moore, 589.

(*y*) *Porter v. O'Meara*, 7 Dowl. 657; *Harvey v. O'Meara*, 7 Dowl. 725; *Hesse v. Wood*, 4 Taunt. 691; *Graham v. Henry*, 1 B. & Ald. 131; *Bryan v. Wagstaffe*, 5 B. & C. 314; 8 D. & R. 208; 1 Moo. & P. 135, n., S. C.; *Pigou v. Drummond*, 1 Bing.

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errors in the proceeding apparent on the record. And where a bailable *capias* upon which a defendant was outlawed had been issued upon a defective affidavit, the court reversed the outlawry on payment of costs, the defendant entering a common appearance (*z*). But an outlawry will not be set aside merely on the ground of the defendant's having constantly appeared in public during the proceedings against him, unless, perhaps, he swears he had no notice of them (*a*), or that the plaintiff might easily have found him so as to have served him with process, and that is not denied by plaintiff (*b*). And though the outlawry be illegal and voidable, it cannot be set aside by a third person in a collateral action (*c*).

What Terms
imposed on
the Defend-
ant.

As to what terms will be imposed on the defendant, by the court or a judge, on reversing the outlawry, it may be observed, that where the proceeding to outlawry is an abuse of the process of the court, (as, for instance, where it was taken with a knowledge that the defendant was represented by an attorney in this country, and without applying to such attorney), the court will set aside the outlawry without imposing any terms, and will even compel the plaintiff to pay the costs of the application (*d*). And if there be error apparent on the record, it has been laid down by high authority, that the party has a right to reverse the outlawry, and the court cannot impose terms (*e*). In ordinary cases, however, of applications to reverse outlawry for error not apparent on the face of the record, where the plaintiff has not been guilty of any improper conduct, the terms imposed are, as follows:—In the case of outlawry on final process, payment of the debt, or damages and costs, including costs of the outlawry, &c. (*f*). And before the 1 & 2 *V. c.* 110, s. 18, the court would not impose, as one of the terms, that the defendant should pay interest from the time of signing final judgment to the period of reversal (*f*); but, perhaps, this would be decided otherwise since that act. In the case of outlawry on mesne process, under similar circumstances, the terms are,—the entry of a common appearance to the action (*h*), or (in case of a reversal for want of proclamation under the statute of Elizabeth) to a new action (*i*), and payment of costs (*k*); or, before the 1 & 2 *V. c.* 110, if the action were bailable, the defendant (at least if not in custody on the *capias utlagatum*) would have been required to put in special bail, instead of merely entering a common appearance (*l*). But this would not, it seems, be required since that act, unless the plaintiff shew, by affidavit, that the defendant is about to quit England forthwith; and, perhaps, not even

N. C. 354; 1 Scott, 264, S. C.: *Levi v. Claggett*, 1 M. & W. 547; 5 Dowl. 322, S. C.

(*z*) *Houlitch v. Swinfen*, 3 Scott, 170; 5 Dowl. 37, S. C.

(*a*) *Johnson v. Driver*, 1 Dowl. 127.

(*b*) See *James v. Jenkins*, 9 Moore, 589; *Biscoe v. Kennedy*, 2 Wils. 127. As to the determination of outlawry by death, &c., see *Tidd*, 144.

(*c*) *Symonds v. Parmenter*, 1 W. Bl. 20.

(*d*) See *Pigou v. Drummond*, 1 Bing. N. C. 354: see when not, *Hunter v. Whitefield*, 3 Bing. N. C. 878.

(*e*) See *per Patteson, J.*, in *Ibbotson v. Fenton*, 1 Nev. & P. 782.

(*f*) *Ibbotson v. Fenton*, 1 Nev. & P. 779.

(*h*) See *Hesse v. Wood*, 4 Taunt. 691.

(*i*) *Ante*, 929, 930.

(*k*) See *Summervil v. Watkins*, 14 East, 536; *Hesse v. Wood*, 4 Taunt. 691; *Solly v. Forbes*, 2 Moore, 567; 8 Taunt. 516, S. C.: *Porter v. O'Meara*, 7 Dowl. 657.

(*l*) See *Sercoold v. Hamson*, 2 Str. 1178, and last note. In *Sercoold v. Hampson*, the court said it was discretionary to require bail or not.

then, unless an order to arrest has previously been obtained, by application to a judge at chambers, under the third section (*m*). It may be here added, that custody on a *capias utlagatum* has been held to be custody upon mesne process, within the seventh section of the 1 & 2 V. c. 110; therefore, where in a bailable action, during the absence of the defendant abroad, an outlawry was completed, and *capias utlagatum* issued before the 1 & 2 V. c. 110 came into force, and the defendant was arrested thereon after that act came into force, the outlawry was reversed, and the defendant discharged, on entering a common appearance and payment of costs (*n*).

As to the time of making the application:—if the ground of the application be merely irregularity in the proceedings, the motion must be made promptly after the defendant is apprised of them (*o*). But if the ground of the application be any defect, whether appearing on the record or not, which would form the ground of a writ of error, it would seem that the application may be made at any time within which a writ of error may be brought.

Formerly, in the Queen's Bench, the defendant was obliged to appear in person when he applied to reverse an outlawry; but now he may appear for that purpose by attorney in any of the courts (*p*). If the party outlawed do not appear in person, the person making the application must state in his affidavit that he makes it on the behalf and by the authority of the outlaw (*q*). A party outlawed may appear in court for reversing his outlawry, though not for most other purposes (*r*).

It is entirely in the discretion of the court or judge, where bail is required, whether the recognisance of bail be in the alternative, to pay the condemnation money or render the defendant; or absolute, for the payment of the condemnation money, as in the case of bail in error (*s*). In a case previous to the 1 & 2 V. c. 110, where the defendant was abroad at the suing out of the *exigent*, and it appeared that he had not gone abroad for the purpose of avoiding the process of the court, bail in the alternative merely was required (*t*); and since that act, it is probable that bail would not be required; at least, not unless the defendant were about to quit England (*u*). To this, however, there was, before the 1 & 2 V. c. 110, one exception, namely, where the defendant sought to reverse the outlawry for want of proclamations: then, before the allowance of the writ of error, or reversing the outlawry by plea or otherwise, he must have put in bail, not only to appear and answer the plaintiff, but also to satisfy the condemnation, provided the plaintiff began his suit before the end of two terms next after allowing the writ of error, or otherwise avoiding the out-

(*m*) See *per Coleridge, J.*, in *Harvey v. O'Meara*, 7 Dowl. 725.

(*n*) *Harvey v. O'Meara*, 7 Dowl. 725.

(*o*) *Anderson v. Alexander*, 2 Dowl. 267.

(*p*) 4 & 5 W. & M. c. 18, s. 3: *Anon.*, Loft, 372, 520.

(*q*) *Plunkett v. Buchanan*, 5 D. & R. 625; 3 B. & C. 736. S. C.: *Houlditch v. Swinfen*, 5 Dowl. 36; 2 Bing. N. C. 712, S. C.

(*r*) See *Loukes v. Holbeche*, 1 Moo. & P. 126; 4 Bing. 419, S. C.: *ante*, 926.

(*s*) *Graham v. Henry*, 1 B. & Ald. 131.

(*t*) *Id.*: *Levi v. Claggett*, 5 Dowl. 322; 1 M. & W. 547, S. C.: and see *Graham v. Grill*, 1 M. & Sel. 409; *Mathews v. Gibson*, 8 East, 527; *Havelock v. Geddes*, 12 East, 622; *Serocold v. Hampsey*, 1d. 624.

(*u*) *Harvey v. O'Meara*, 7 Dowl. 725.

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Practical Pro-
ceedings to
reverse an
Outlawry on
Mesne Pro-
cess.

lawry (*x*); in which case it was not at the discretion of the court or judge to order the recognisance to be in the alternative (*y*). And perhaps this would still be the case.

In order to reverse the outlawry upon mesne process, in cases where bail is not required, *enter an appearance for the defendant, as directed ante, Vol. I. 121; and get a certificate from one of the masters of your having done so. Get a copy of the exigent, and mark on it some common error, (if no real error, be in the proceedings), such as the want of addition, or that the defendant was in prison or out of the country at the time of issuing the exigent, or the like; and take these to a judge at chambers, and he will, on their being laid before him, make an order for the reversal of the outlawry, upon payment of the costs of the outlawry. Take the order to one of the masters, who will thereupon enter the proceedings on the roll, (if they have not already been entered by the plaintiff), and docket the same. He will also mark the outlawry as reversed in his book, and enter the reversal on the roll, which should be filed in the treasury (z).* If the order be drawn up on payment of costs, the costs must be taxed and paid before the outlawry can be reversed. Or, in cases where bail is required, (*ante*, 936), as soon as your bail have justified, then, upon affidavit of that fact, *apply to a judge, or move the court to reverse the outlawry; or, if the defendant be in custody under the capias utlagatum, then, instead of putting in and perfecting bail, produce to the judge or court the sheriff's or gaoler's certificate of the defendant's being in custody, and verify it by affidavit. In either case, when the application is made by defendant's attorney, produce an affidavit of his authority to make it (a). Previously to making the application, give the copy of the exigent, marked as above mentioned, to one of the masters, who or whose clerk will produce it at the time the application is made. Then take the rule to the master, and proceed as above directed. The court have refused to reverse the outlawry because the record was not in court (b).*

Supersedeas
when Defen-
dant in Cus-
tody.

The defendant should also, if in custody on the *capias utlagatum*, sue out a *supersedeas* with one of the masters, upon which he shall be discharged out of custody, or it will prevent the sheriff from executing a *capias utlagatum*, general or special, against him in the same cause, if not already executed (*c*). Or, if his property be still in the sheriff's hands under a special *capias utlagatum*, and the produce of it not paid over to the plaintiff (*d*), it shall be restored to the defendant by a writ of *amoveas manus*, or other proceeding in the Court of Exchequer, for which he must apply to his clerk in court (*e*).

Practical Pro-
ceedings to
reverse Out-

When the defendant is outlawed after judgment, as the condition of reversing it is the payment of the debt and costs to

(x) 31 El. c. 3, s. 3.

(y) See Tidd, 9th ed., 141, 142: *Taylor v. Waters*, 2 B. & C. 353; 3 D. & R. 575, S. C.: *Roger v. Cooke*, 3 B. & C. 529; 5 D. & R. 302, S. C.

(z) See the form of *supersedeas*, Chit. Forms, 548.

(a) *Ante*, 937.

(b) Lofft, 348, 370.

(c) See a form of entry, Chit. Forms, 558.

(d) See *Pinfold v. Northey*, 2 Lev. 49: and see *Frost's case*, 5 Co. 90: *Ejre v. Woodfine*, Cro. El. 278.

(e) The clerks in court and side-clerks have still exclusive right to practise in such matters. (*In re Otho Manners*, 7 Dowl. 516).

the plaintiff, you must first get him to enter satisfaction on the roll, before you can make the application. *Get a certificate to that effect from one of the masters; and take it, together with a copy of the exigent, marked as above mentioned, to a judge at chambers, who will thereupon make an order. Afterwards you proceed as above directed.*

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lawry after
final Judg-
ment.

It would seem that the court will make a *conditional* order for setting aside an outlawry, in order to prevent an insolvent from remaining in custody unnecessarily (*f*).

Reversal in
case of Insol-
vency.

Reversal by Writ of Error.] Judgment of outlawry may be reversed by writ of error *coram nobis*, either for matter of law apparent upon the record, or for matter of fact not appearing upon it (*g*). As to the mode of proceeding in this case, see *ante*, Vol. I. 339 (*h*). Bail must be put in and perfected in the same cases and in the same manner as where the outlawry is reversed upon motion, &c. If the judgment be reversed, the *supersedeas* is made out and signed by one of the masters (*i*).

Reversal by
Writ of Error.

This mode of proceeding by writ of *error*, however, is very seldom adopted in practice; for the court will always afford relief upon motion, or a judge at chambers on summons, as already mentioned, if the defendant be willing to comply with those conditions upon which alone they will grant it; namely, entering an appearance, or putting in and perfecting bail, and paying the costs of the outlawry, where the outlawry was upon mesne process; or paying the debt and costs, and the costs of the outlawry, where the outlawry was upon final process. There may be cases, however, in which reversing an outlawry by writ of error may be advisable.

Costs.] The party reversing the outlawry is, in general, obliged to pay the costs (*k*). Even where an attorney (plaintiff in person) outlawed a defendant, although he knew that a person received an annuity for the defendant under a power of attorney during his absence abroad, and also knew several persons with whom the defendant was acquainted, without applying to the receiver or to those persons; the court would not make the plaintiff pay the costs of reversing the outlawry (*l*). So, where the party applying to reverse the outlawry fails, even by a formal defect in his affidavits, the rule will, it seems, be discharged with costs (*m*). But, where it has appeared that the plaintiff proceeded to outlawry merely for the purpose of harassing and oppressing the defendant—as where it appeared that the defendant was actually in custody at the suit of the plaintiff for another cause of action at the time of the *exigent* awarded (*n*); or where the defendant was constantly to be met with, and might have been arrested

Costs.

(*f*) *Nicholson v. Nichols*, 3 Dowl. 326: 409: *Summerril v. Watkins*, 14 Fast, 536: see *R. v. Insolvent Court*, 3 Nev. & P. 543: *Hesse v. Wood*, 4 Taunt. 691: *Graham v. Adcock v. Fisk*, C. P., 5th November, 1839. *Henry*, 1 B. & Ald. 131.

(*g*) See Vol. I. 339.

(*h*) See as to the form, Chit. Forms, 145 to 148.

(*i*) See a form of *supersedeas*, Chit. Forms, 550.

(*k*) See *Graham v. Grill*, 1 M. & Sel.

(*l*) *Hunter v. Whitfield*, 3 Bing. N. C. 878.

(*m*) *Houlditch v. Swinfen*, 5 Dowl. 36, C. P.

(*n*) *Adlame v. Colebatch*, 2 Salk. 495: *James v. Jenkins*, 9 Moore, 589: 2 Sellon,

412.

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or served with process (*o*); or where the defendant was abroad, and was represented by an attorney in this country, and the plaintiff proceeded to outlawry without making any application to the attorney (*p*), the court have ordered the plaintiff to reverse the outlawry at his own expense.

(*o*) *Seabrook v. Howkin*, Sir Thos. Jones, 322: *Roger v. Cook*, 3 B. & C. 529; 5 D. 211: *Hilliard v. Smith*, Comb. 19: *Hill v. & R.* 302, S. C.
Wilkes, 12 Mod. 413: see *Holman v. Bra-* (*p*) *Pijou v. Drummond*, 1 Bing. N. C.
zier, Barnes, 320: *Tamworth v. Smith*, Id. 354; 1 Scott, 264, S. C.

CHAPTER III.

REMOVAL OF PRISONERS INTO THE CUSTODY OF THE MARSHAL,
OR WARDEN.

CHAP. III.

PRISONERS in the custody of the sheriff, or in the prisons of inferior courts, may be removed into the custody of the marshal, by the writ of *habeas corpus ad faciendum et recipiendum*, (usually called a *habeas corpus cum causâ*), or by the writ of *habeas corpus ad respondendum*, or the writ of *habeas corpus ad satisfaciendum*, according to circumstances.

By what Writs.

Habeas Corpus cum Causâ.] If the defendant be in custody of the sheriff, or in the Fleet or other prison, under process of the Court of Queen's Bench, he has a right to remove himself into the custody of the marshal, if he wish it, by this writ of *habeas corpus cum causâ*, even although he should also at the same time be detained upon process of the Common Pleas or other courts. And in the same way, if he be in custody of the sheriff or of the marshal, under process out of the Common Pleas or Exchequer, he may have himself removed into the Fleet by this writ. The defendant might also before the 1 & 2 V. c. 110, have been removed by the plaintiff for the purpose of declaring against him, &c. (a); but this was even then unnecessary and seldom done, and cannot, at all events, it would seem, be done in an action commenced since the passing of that act. As to its use when the defendant is in custody in an inferior court, see the next Chapter.

Habeas Corpus cum Causâ.

By this writ, also, a prisoner in the Fleet, or in the custody of the marshal, sheriff, &c., may be brought up in order to be rendered by his bail, in an action pending in the Queen's Bench, &c. As to this, see *ante*, Vol. I. 623, &c.

To render the Defendant.

This writ is grantable of course, and may be sued out in term or vacation; but it must bear *teste* in term. It may be made returnable *immediate* (b). *Engross it on a plain piece of parchment* (c); *or get a blank form at the stationer's, and fill it up; and write out a præcipe on plain paper. Get the writ signed and sealed.* It must be also signed by the chief justice, or, in his absence, by one of the other judges of the court out of which it issued (d); and, unless so signed, the sheriff is not obliged to execute it (e). In the Exchequer it ought perhaps to have the name and address of the attorney who issued it, indorsed or written thereon, and also the day, month, and year when issued (f). *Take it to the office of the sheriff or officer in whose custody the defendant is, and he will have him brought up to the judge's chambers; pay him his fees* (g).

Form of, when and how sued out, &c.

The officer should bring him to the judge's chambers in due How obeyed, &c.

(a) See *Bettesworth v. Bell*, 3 Burr. 1875.

(b) *Bettesworth v. Bell*, 3 Burr. 1875. See *R. v. Batchelder*, 1 Per. & D. 516.

(c) See the form, Chit. Forms, 561.

(d) 1 & 2 P. & M. c. 13, s. 7.

(e) *Re v. Rodham*, Cowp. 672.

(f) R. M., 1 W. 4, reg. 2, s. 1: 1 C. & J. 274: and see *Sheppard v. Shum*, 2 C. & J. 632.

(g) See *Anon.*, 1 Str. 308: *Hopman v. Barber*, 2 Id. 814.

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and convenient time(*h*), without permitting him to wander under pretence of such writ(*i*). Neither should the officer deviate from the direct road, or allow the defendant to go at liberty in conveying him to the judge's chambers; for, if he do, it would be an escape(*k*): he must also take force sufficient to prevent the defendant from being rescued, as a rescue of the defendant would make the sheriff liable to an action for an escape(*l*). If the officer to whom the writ is directed do not obey it, he will, after being ruled to return the writ(*m*), be liable to an attachment(*n*). When the prisoner is brought up to chambers, any of the judges who are then sitting (although the writ be returnable before the chief justice only) will commit him to the Queen's Bench prison, or to the Fleet, as the case may be, and he will be sent there in the custody of a tipstaff. *Pay the tipstaff his fee*(*o*). If the writ be directed to the marshal, it remains with him, and is not returned to the Queen's Bench(*p*); and the same when directed to the warden of the Fleet.

Habeas
Corpus ad
responden-
dum.

Habeas Corpus ad respondendum.] The writ of *habeas corpus ad respondendum* was formerly used for the purpose of removing a prisoner to the prison of the court in which the action was pending, in order to declare against him. But since the 2 *W. 4, c. 39, s. 8*, it seems that it is unnecessary(*q*), and it therefore needs no further notice.

Habeas
Corpus ad
satisfaciendum,
to
charge De-
fendant in
Execution.

Habeas Corpus ad satisfaciendum.] If a defendant, against whom you have a judgment in one of the superior courts, be a prisoner in the Marshalsea or Fleet, or in the prison of any inferior court, but at the suit of a third person, and not of the plaintiff, the latter may have him brought up in the court in which the judgment is obtained by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution(*r*). But where the defendant is in a county gaol, the plaintiff is not entitled as of right to this writ, with a view to remove him to the custody of the marshal, &c.; the issuing of such writ is discretionary with the court, and it would in most cases be refused, as the defendant may be charged in execution by a *capias ad satisfaciendum*(*s*).

To charge
Plaintiff in
Execution.

Also this writ lies to bring up a plaintiff already in custody in order to charge him in execution for costs of a nonsuit, or verdict against him; and in such case no affidavit is necessary to warrant the issuing of the *habeas*, nor is it necessary that any day certain for the bringing up of the party should be inserted, or that the number-roll of judgment should appear therein(*t*).

Form of, how
sued out, &c.

This writ must bear *teste* in term, and be returnable in court upon a day certain in term. *Sue it out in the same manner as the habeas corpus cum causâ, ante, 941.* No affidavit is necessary to obtain it(*t*). The writ need not, it seems, be now

(*h*) *Bettesworth v. Bell*, 3 Burr. 1875.

(*i*) R. M., 1654, ss. 7—10.

(*k*) Roll. Abr., Escape, D. 9: *Anon.*, Cro. Car. 14: *Balden v. Temple*, Hob. 202.

(*l*) *Compton v. Ward*, 1 Str. 429.

(*m*) *Semble, Rex v. Wright*, 2 Str. 915.

(*n*) *Rex v. Winton*, 5 T. R. 89.

(*o*) See *In re Salisbury*, 5 B. & Ald. 266.

(*p*) *Cooper v. Jones*, 2 M. & Sel. 202.

(*q*) *Barnett v. Harris*, 2 Dowl. 187. See the former practice as to this writ, in the 6th edition of this Work, Vol. II. p. 990.

(*r*) See *ante*, 859: *Sandys v. Hornby*, 5 Nev. & M. 59.

(*s*) *Williams v. Jones*, 2 C. & J. 611.

(*t*) *Furnival v. Stringer*, 5 Dowl. 195; 3 Scott, 551, S. C.

marked or indorsed with the term and number of the roll of the judgment(*u*). Although the judgment be against several, yet it is not necessary that this writ should be against more than those defendants who are in actual custody(*x*). Where the writ is for the residue of a debt, after a *fi. fa.* is executed, it is not necessary that it should refer to what has been done under the *fi. fa.*(*y*). *Having made a duplicate of it, deliver the writ to the officer to whom it is directed, who will bring the prisoner up into open court on the return day.* It is usual to deliver the writ to the officer at least four days before the prisoner is brought up(*z*). *When the prisoner is brought up, give the duplicate of the habeas to the judge's clerk, who will take it to one of the masters; and the master will then mark the commitment on the duplicate, and give it to the tipstaff, in whose custody the prisoner is taken to the Queen's Bench, or Fleet prison, as the case may be; the habeas itself is filed in court.* In vacation, it seems, the writ should be lodged with the marshal, or warden, who will detain the prisoner thereon till the next term, and then bring him up as above mentioned. By *R. M.* 1654, s. 10, C. P., the writ, when lodged, is a good cause of detainer. As to the mode of charging the defendant in execution, by means of this writ, see *ante*, 858.

(*u*) The rule of H. T., 21W. 4. r. 9, dispenses with the entry of the proceedings on record. See *Furnival v. Stringer*, 5 Dowl. 195; 3 Scott, 551, S. C.; and the prior case of *Wilson v. Bacon*, 2 Dowl. 450; and the rule of M. T., 1654. See the

form, Chit. Forms, 562.

(*x*) *Wilson v. Bacon*, 1 Dowl. 118.

(*y*) *Green v. Foster*, 2 Dowl. 191, S. C.

(*z*) See *Park v. Torre*, 3 B. & B. 93; 6 Moore, 260, S. C.

CHAPTER IV.

REMOVAL OF CAUSES FROM INFERIOR COURTS, &c.

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BOOK IV.
PART I.1. Removal
of the Cause
before Judgment.
By what
Writs.1. *Removal of the Cause before Judgment.*

By what Writs.] CAUSES from inferior courts, not being courts of record, may in general be removed into the Court of Queen's Bench, Common Pleas, or Exchequer, by writs of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, according to circumstances; and from inferior courts of record, by *habeas corpus* or *certiorari*(a). But as causes depending in inferior courts not of record are seldom in practice removed into the superior courts except in replevin, it is enough here to refer to a former part of this Volume(b) where the writs of *pone*, *recordari facias loquelam*, and *accedas ad curiam*, have been already noticed. We shall accordingly confine our attention in this Chapter to the writs of *habeas corpus cum causâ* and *certiorari*, the writs used to remove causes into the superior courts from inferior courts of record, as already mentioned.

By Habeas
Corpus cum
Causâ.

The writ of *habeas corpus cum causâ* lies only where the action in the inferior court of record has been commenced by process against the person, or, in other words, by process under which the defendant is supposed to be in the custody of the court below(c); and therefore, where the proceedings in the

(a) In an action or suit on the common law side of the court of the vice-warden of the Stannaries of Cornwall, it is enacted, by the late statute of 6 & 7 W. 4, c. 106, s. 42, that "it shall be lawful for the Court of King's Bench at Westminster, on the application of any party to any such action or suit, on special and sufficient cause shewn by *affidavit*, to the satisfaction of the said Court of King's Bench, that an impartial or sufficient trial cannot be had in such court of the vice-

warden, to remove by writ of *certiorari* all proceedings which may have been had in such action or suit, and to deal therewith, and to make such orders respecting the same, and the future trial of and proceedings in such action or suit, as to the said Court of King's Bench shall seem meet."

(b) See p. 795, &c.

(c) *Mitchell v. Mitchenham*, 1 B. & C. 513; 2 D. & R. 722, S. C.; *Palmer v. Forsyth*, 4 B. & C. 401; 6 D. & R. 407, S. C.

inferior court are by plaintiff only, the proceedings cannot be removed by *habeas corpus* (*d*). It cannot be used by the plaintiff to remove his own cause (*e*). The effect of the writ before the 1 & 2 V. c. 110, was to remove the body of the defendant when actually in custody into the superior court, and also the several actions with which he was charged in the inferior court (though not the records); or if he were not in actual custody, then the actions only. And although the first section of that act enacts, that no person shall be arrested on mesne process in any civil action in any inferior court whatsoever, yet it would seem that this writ may still be employed for the removal of the cause in cases where the process is in form against the person, though the defendant be not and cannot be actually arrested under it. It is no objection to the writ, that the attorney who sued it out is uncertificated; for the party ought not to be punished for his attorney's neglect (*f*).

The *certiorari* lies in all cases before judgment, whether the action were commenced by process against the person or not; and it may, it seems, be sued out to remove an ejectment, as well as other actions pending in inferior courts of record (*g*). By Certiorari.

[When not removable.] Neither the *habeas corpus* nor the *certiorari* lies where the debt or damages laid, or things demanded in the declaration in the court below, do not amount to 5*l.*, if the steward or judge of such court be a barrister of three years' standing; unless the action concern the freehold or inheritance, or title to lands, lease, or rent (*h*); or if there be several causes, some under and others above 5*l.*, those only which are above 5*l.* shall be removed by the *habeas* (*i*). When not removable.

Secondly, it lies not where the action is maintainable only in the inferior court; as, for instance, where an action is brought in the courts in London for calling a woman a whore (*k*), or against a *feme covert* as sole trader (*l*), it cannot be removed by this or any other writ, unless by a writ of error.

Thirdly, it lies not to the counties palatine, unless some special grounds for the issuing of it be first laid before the superior court (*m*).

And, fourthly, it does not in general lie after judgment, except for the purpose of suing out execution, or giving the judgment of an inferior court the effect of a judgment of a superior court, under the 1 & 2 V. c. 110, as to which see *post*, 950. And where a *certiorari* was moved for to remove the record of a judgment in the court at Durham, against a person who was in the custody of the marshal in execution in an action in the Queen's Bench for the purpose of enabling his bail in the court below to render him in the Court of Queen's Bench in

(*d*) *Mitchell v. Mitchenham*, *ubi supra*.

(*e*) See *Meltons v. Gardner*, Cowp. 116; *Tidd*, 404; *Pr. Reg.* 216; *Cas. Pr. C. P.* 5.

(*f*) *Glynn v. Hutchinson*, 3 Dowl. 529.

(*g*) *Goodright d. Sadler v. Dring*, 2 D. & R. 407; 1 B. & C. 253, S. C.; *Patterson v. Eades*, 3 B. & C. 550; 5 D. & R. 445, S. C.; *sed quare*?

(*h*) 21 J. 1, c. 23, ss. 4, 6; see *Fairley v. McConnell*, 1 Burr. 515; *Franks v. Quinsee*,

7 Dowl. 607.

(*i*) 12 G. 1, c. 29, s. 3.

(*k*) *Watson v. Clerke*, Carth. 75.

(*l*) *Pope v. Vaux*, 2 W. Bl. 1060.

(*m*) *Zink v. Langton*, 2 Doug. 749; *Williams v. Thomas*, Id. 751, n.; *Jones v. Davies*, 1 B. & C. 143; and see *Edwards v. Bowen*, 5 B. & C. 206; 7 D. & R. 709, S. C.

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their discharge, the court refused it(*n*). And it has been decided, that, in the case of a judgment by default, if the writ is not delivered until after the jury have assessed the damages on the writ of inquiry, the court will award a *procedendo*(*o*).

When Bail
required be-
fore Removal.

When Bail required before Removal.] No cause can be removed from an inferior court of record by *habeas corpus*, or otherwise, if the cause of action do not amount to 20*l.* (*p*) or upwards; unless the defendant, with two sufficient sureties, enter into a recognisance, in double the amount in the court below, conditioned for the payment of the debt and costs in case judgment shall pass against him (*q*). This statute applies only to cases of removal before judgment (*r*). If the sum in the declaration be 20*l.* or more, the plaintiff is precluded from his right to require a recognisance under either of the statutes, though the sum sought to be recovered be really less (*s*). The statutes requiring bail, apply to actions of tort; such as trover (*t*), slander (*u*), injury to right of way (*x*), and so forth, where the damages claimed are less than 20*l.*

Form, Direc-
tion, Teste,
&c., of the
Writ.

Form, Direction, Teste, &c., of the Writ.] The writ is directed to the judge or steward of the inferior court, and it is tested on some day in term; and it may be returnable *immediate*, if directed to the inferior courts of London, Westminster, Southwark, or other court within four miles of London (*y*); and in all other cases on some day certain in term (*z*). If the defendant be in custody, the writ of *habeas corpus cum causâ* should be directed to the sheriff or other officer in whose custody the defendant is detained (*a*).

Consequence
of Defects
in Form.

With respect to informalities in writs of *certiorari* it is to be observed, that third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior court, if the proper officer in whose keeping the record is waive the objection, and return the record upon such writ (*b*). If a plaintiff without improper motives has removed a judgment into a superior court, by an irregular writ of *certiorari*, issued without leave of the court, such amendments will be allowed and terms imposed as will enable him to avail himself of the judgment without prejudice to the defendant (*c*). Where a party has by mistake issued a *certiorari* instead of a *re. fa. lo.*,

(*n*) *Patterson v. Reay*, 2 D. & R. 177: and see *Bevan v. Prothesk*, 2 Burr. 1151.

(*o*) *Smith v. Sterling*, 3 Dowl. 609: and see *Walker v. Gann*, 7 D. & R. 769: *Bevan v. Prothesk*, 2 Burr. 1151: see *Cox v. Hart*, 2 Burr. 758: *Godsby v. Marsden*, 4 Moo. & P. 138: 6 Bing. 433, S. C. The Court of Common Pleas, however, held, that where a cause was removed from an inferior court after interlocutory judgment, and before inquiry, a *procedendo* would be refused. *Sed quære?* (See *per Holroyd, J.*, in *Walker v. Gann*, *ubi supra*).

(*p*) See 7 & 8 G. 4, c. 71, s. 6: *Brady v. Veeres*, 5 Dowl. 415.

(*q*) 19 G. 3, c. 70, s. 6: 7 & 8 G. 4, c. 71, s. 6: see *Atterborough v. Hardy*, 4 D. & R. 362: 2 B. & C. 802, S. C.: *Cotton v. Baiers*, 1 Jurist, 22.

(*r*) *Crookes v. Longden*, 7 Dowl. 413; 5

Bing. N. C. 410, S. C.

(*s*) *Brady v. Veeres*, 5 Dowl. 416.

(*t*) *Furnish v. Swann*, 10 B. & C. 458.

(*u*) *Lee v. Goodlad*, 4 D. & R. 350.

(*x*) *Franks v. Quinsee*, 7 Dowl. 607.

(*y*) See R. H., 13 & 14 Car. 2: R. M. 1654.

(*z*) R. H., 13 & 14 Car. 2: see *Rowell v. Breedon*, 3 Dowl. 324. See the form of the *habeas corpus*, Chit. Forms, 561; and of the *certiorari*, &c., Id. 565; and of the different directions of the writs of *habeas*, &c., Id. 561.

(*a*) Tidd, 9th ed., 349, &c.: see *Perrin v. West*, 3 A. & E. 405; 5 Nev. & M. 291, S. C.

(*b*) *Daniels v. Phillips*, 4 T. R. 499; 3 Dowl. 325, n.

(*c*) *Rowell v. Breedon*, 3 Dowl. 324.

the rule to quash it, on his application, is absolute in the first instance (c).

CHAP. IV.

Writ how sued out, &c.] In some cases you are obliged to obtain the leave of the court to sue out the writ. But this appears to be necessary only in case of the courts of the counties palatine. In other cases it has been held, that no leave of the court or fiat of a judge (d) is necessary, and the writ may be sued as a matter of course (e). Your affidavit for that purpose must not be intitled in any cause; or, if intitled, it cannot be read (f). The rule for a *certiorari* is absolute in the first instance (g). *Sue out the writ in the manner directed ante, 941, and leave it with the clerk of the papers or secondary of the inferior court.*

Writ how
sued out.

Within what Time to be sued out and delivered.] The writ must be delivered to the judge or officer of the inferior court, at latest, before any of the jury are sworn (h); and before issue or demurrer joined, if such issue or demurrer be not joined within six weeks after the arrest or appearance of the defendant (i); and before judgment by default (j); or, at all events, before any one of the inquest are sworn, after a judgment by default (k); otherwise the writ shall not be received or allowed by such judge or officer, and the inferior court may proceed in the cause. If the judge or officer of the inferior court receives the *certiorari* after the time thus limited, a *procedendo* will issue, and that although in the meantime the record has been filed in the court above (l).

Within what
Time to be
sued out and
delivered.

How obeyed and returned.] In cases where the writ lies, it has the effect of suspending all proceedings in the actions against the defendant in the inferior court, immediately upon its being delivered to the officer (m), and the writ must be obeyed without delay (n). The *habeas corpus* is obeyed, by bringing up the defendant (if in custody (o)), and by returning the causes with which he stands charged; the record itself is not removed into the court above, but remains in the

How obeyed
and returned.

(c) *Ruffman v. Thornwell*, 7 Dowl. 613.

(d) *Walkington v. Davis*, 29th April, 1839, at chambers, *coram Erskine, J.*, after consulting with other judges. It was the case of an *habeas* to the Palace Court.

(e) See per Littledale J., in *Landens v. Shiel*, 3 Dowl. 90: *Walkington v. Davis*, *ubi supra*. It has been said, that in the Exchequer the fiat of a baron is necessary where the defendant obtains such a writ, and it is the common practice to procure the fiat. It does not clearly appear why a writ which is as much of right in the other courts as a writ of error, (see per Littledale, J., and Erskine J., *ubi supra*), should be clogged with this condition in the Exchequer. Perhaps it is because the right to sue in that court in civil cases was originally founded on the fiction that the plaintiff was the queen's debtor; and as this removal is in general effected by the defendant, and not by the plaintiff, the fiction did not apply in these cases; and, consequently, the

court would only allow the removal as a matter of favour. If this be so, considering that even the formula expressing the fiction alluded to is now unnecessary, (see *Doe Bloxham v. Roe*, 6 Dowl. 388), there seems no reason why the practice in the Exchequer should any longer differ from that in the other courts.

(f) *Ex p. Nohro*, 1 B. & C. 267, *semb.*

(g) *Pawsey v. Gooday*, 3 Dowl. 605.

(h) 43 El. c. 5.

(i) 21 J. 1, c. 23, s. 2.

(j) *Ante*, 946: *Wyatt v. Markham*, Barnes, 221.

(k) *Cox v. Hart*, 2 Burr. 759: see *Lawes v. Hutchinson*, 3 Dowl. 506: *Smith v. Sterling*, 3 Dowl. 609.

(l) *Laverack v. Bean*, 3 M. & W. 62.

(m) *Fazachary v. Baldo*, 1 Salk. 352.

It suspends the power of the inferior court, so that, if they proceed, the proceedings would be void, and *coram non judice*.

(n) See *Bettesworth v. Bell*, 3 Burr. 1875.

(o) See *ante*, 941.

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court below (*p*). The return to the *habeas* is, in fact, a mere account or history of the proceedings in the inferior court. The *certiorari* is obeyed by returning the record itself, formally made up, into the court above, in order to be further proceeded upon there (*q*). If, under the particular circumstances of the case, the writ does not lie, those circumstances must be stated specially in the return (*r*).

Bail and Ap-
pearance after
Removal.

Bail and Appearance after Removal.] Previously to the 1 & 2 V. c. 110, if the defendant were in custody when the *habeas corpus* was delivered to the court below, he was removed by it into custody of the marshal or warden, after which he might have been discharged on putting in bail. Or, if he were not in custody, he must have put in special bail, or filed common bail in the court above, according as the action was bailable or not bailable. And by putting in bail in the court above, those in the court below were discharged (*s*). It will be unnecessary further to notice the practice as to putting in special bail on removal from inferior courts, for it would seem, that, as since the 1 & 2 V. c. 110, there can be no arrest on mesne process in any inferior court, special bail cannot now in any such case be required (*t*).

Common Bail
how filed, &c.

In actions, removed by *habeas* or *certiorari*, you file common bail, thus:—*Engross the bail-piece, and annex it to the writ and return, as above directed; file the same at the judge's chambers, and give notice to the plaintiff's attorney or agent of your having done so (u)*. It would seem that common bail cannot be filed before the writ is returned (*x*). The plaintiff may at any time, after the return of the writ (*y*), compel the defendant to put in common bail, by obtaining, from one of the judge's clerks, a rule for a *procedendo*, unless the defendant put in common bail within four days after notice thereof, if in term, or in six days if in vacation (*z*). And if there be several defendants, and the cause be removed by one, common bail must be put in for all, otherwise a *procedendo* may be awarded (*a*).

Procedendo.
For not
putting in
Bail.

Procedendo.] If the defendant do not *put in bail* within the time limited by the rule for that purpose, the plaintiff may sue out a writ of *procedendo*. This writ is grantable by any judge of the court into which the cause was removed, upon application to one of their clerks at chambers. *Engross the writ upon plain parchment (b), directed to the inferior court, commanding them to proceed in the action. Make out a præcipe for the office. Get the writ signed by one of the masters. Take it to the seal office and get it sealed. Take it to the secondary of*

(*p*) *Fazacharly v. Baldo*, 1 Salk. 352.

(*q*) See *Palmer v. Forsyth*, 4 B. & C. 401; 6 D. & R. 497, S. C.: *Askew v. Hay-ton*, 1 Dowl. 510.

(*r*) See forms of return, Tidd's Forms, 147, 156.

(*s*) MS., M. 1814: *Taylor v. Shapland*, 3 M. & Sel. 328.

(*t*) See the 1 & 2 V. c. 110, s. 1: and see the former practice as to putting in special bail, in the 6th edition of this Work, Vol. II. 996, 997.

(*u*) See the form of the common bail-

piece, Chit. Forms, 547; and of the notice of having filed it, Id. 547.

(*x*) R. M. 1651: R. E., 29 C. 2: R. H., 10 W. 3.

(*y*) *Clarke v. Harbin*, Barnes, 90: see *Lee v. Goodlad*, 4 D. & R. 350.

(*z*) See R. M. 1654, s. 8: R. H., 10 W. 3. See the form, Chit. Forms, 563.

(*a*) *Keat v. Goldstein*, 7 B. & C. 525; 1 M. & R. 305, S. C.: *Jameson v. Schonswar*, 1 Dowl. 175.

(*b*) See forms of *procedendo*, Chit. Forms, 564.

the inferior court, and file it; and the cause will be then proceeded in, in the inferior court, from the stage in which it was at the time the *habeas* or *certiorari* was served. But, if bail be put in, or the defendant has rendered himself, after the expiration of the rule, and before the *procedendo* sued out, it seems the *procedendo* cannot be sued out afterwards (*c*).

And, generally, if the defendant, upon removing a suit commenced against him, does not comply with the statutes and rules of court, made to regulate the proceedings therein, upon such removal, as by not pleading in due time to the declaration delivered, or the like, the plaintiff may obtain a *procedendo*. Also, if the court below state, in their return to the *habeas* or *certiorari*, circumstances from which the court judge that the writ ought not to have issued, a *procedendo* will be awarded (*d*).

For other Causes.

If the *procedendo* has been improperly awarded or issued, the opposite party may apply to the court out of which it issued, to have it quashed.

Quashing *Procedendo*.

The court will not quash a regular writ of *certiorari*, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done it for the purpose of delay (*e*).

Quashing *Certiorari*.

By stat. 21 *Jac.* 1, c. 23, s. 3, after the cause has thus been remanded, it can never afterwards be removed before final judgment (*f*). Even where the plaintiff, after the cause was thus remanded, recovered in the court below, and then sued the bail below upon their recognisance, who removed the proceedings into the King's Bench by *habeas*, the court, upon application, awarded a *procedendo* (*g*). But this provision of the statute of James does not extend to applications by bail (*h*).

Removal after *Procedendo*.

Proceedings after Removal.] After the cause has been removed into the court above, by the plaintiff, the plaintiff may be compelled to proceed, as pointed out *ante*, 798, on such a removal. The plaintiff must declare within the second term, inclusive, after bail has been put in and perfected, otherwise he may be *nonprossed*, but, if not *nonprossed*, the cause is not out of court till a year after the return of the writ for the removal of it (*i*). After the cause has been removed by the defendant, the plaintiff may proceed in the action or not, at his discretion; there are no means of compelling him to do so (*k*); and the defendant cannot, in such a case, *nonpros* the plaintiff (*l*); but the cause will be out of court if the plaintiff do not declare within a year after the return of the writ for the removal of it; and after that time the defendant need not receive the

Proceedings after Removal.
Declaration.

(c) *Johnson v. Walker*, 4 B. & Ald. 535: and see *Wiggins v. Stephens*, 5 East, 533.

(d) See *Watson v. Clerke*, Carth. 75: *Pope v. Vaux*, 2 W. Bl. 1060: *Fazachary v. Baldo*, 1 Salk. 352: *Horton v. Beckman*, 6 T. R. 760: *Jones v. Davies*, 1 B. & C. 143: and see *Fry v. Carey*, 1 Str. 527.

(e) *Landens v. Sheil*, 3 Dowl. 90. See as to writs of error, *ante*, Vol. I. 361.

(f) See *Lawes v. Hutchinson*, 3 Dowl. 506.

(g) *Dixon v. Heslop*, 6 T. R. 365: see *Lawes v. Hutchinson*, 3 Dowl. 506; 1 C.,

M. & R. 766, S. C.

(h) *Glynn v. Hutchinson*, 3 Dowl. 529.

(i) *Norrish v. Richards*, 5 Nev. & M. 268; 1 H. & W. 437, S. C. It was the case of a removal by *habeas corpus*.

(k) *Clark v. Dixon*, 3 M. & Sel. 93: *Clerk v. Mayor of Berwick*, 4 B. & C. 649; 7 D. & R. 104, S. C.: *Norrish v. Richards*, 5 Nev. & M. 268; 1 H. & W. 437, S. C.

(l) *Id.*: R. M., 16 C. 2: *Davies v. James*, 1 T. R. 372: *Clerk v. Mayor of Berwick*, 4 B. & C. 649; 7 D. & R. 104, S. C.

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declaration (*m*). If the plaintiff do proceed, he must begin *de novo*, by declaring against the defendant, whatever may have been the stage in which the cause was in the inferior court at the time it was removed, and this, whether the removal was by *habeas* or *certiorari* (*n*). The plaintiff, however, cannot declare before bail is put in. The rule of *M. T.*, 3 *W.* 4, as to commencements of declarations, does not apply to causes removed from inferior courts; and therefore it seems that the declaration should be in the old form (*o*). There is no objection, at least if the removal be by *habeas*, to the plaintiff's declaring in a different form of action from that which he commenced in the court below, provided it be for the same cause of action (*p*), and not for a larger amount (*q*).

Plea, &c.

The time for pleading is the same as in *replevin*, *ante*, 801; but no imparlance is allowed, although the plaintiff do not declare until the next term after the bail are perfected, provided he declare on or before the last day of the term (*r*).

The subsequent proceedings are the same as in ordinary cases.

Costs.

If the plaintiff have judgment, he shall be entitled to, and allowed, the costs of the proceedings in the inferior court (*s*).

2. Removal of Judgments, Rules, &c., of Inferior Courts, for the purpose of Execution (*t*).

2. Removal of Judgments of Inferior Courts of Record generally by 19 G. 3, c. 23.

Removal of Judgments of Inferior Courts of Record generally by 19 G. 3, c. 23.] By statute 19 *G.* 3, c. 70, s. 4, where judgment is given in an inferior court of record, (or in the courts of the counties palatine) (*u*), any of the superior courts (*v*) at Westminster (upon affidavit of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against his person or effects, as the case may be, and that his person or his effects are not to be found within the jurisdiction of the inferior court) may cause the record of the judgment to be removed into such superior court, and issue writs of execution thereon against the person or effects of the defendant, in the same manner as upon judgment in the said courts at Westminster (*x*). This statute does not extend to an ejectment (*y*). Nor to judgments against the garnisher in foreign attachment in the lord mayor's court of London (*z*). Nor to judgments for defendants (*a*). The amount for which the judgment was obtained is immaterial (*b*). It seems that the leave of the court is necessary,

(*m*) *Clarke v. Harbin*, Barnes, 90; *Hutton v. Stroubridge*, 1 Str. 631; *Norrish v. Richards*, 5 Nev. & M. 268; 1 H. & W. 437, S. C.

(*n*) R. M., 16 C. 2: *Fazacharly v. Baldo*, 1 Salk. 352; *Turner v. Bean*, Barnes, 345.

(*o*) *Dod v. Grant*, 6 Nev. & M. 70; 4 Ad. & E. 485, S. C.

(*p*) *Gunn v. Macheury*, 1 Wils. 277; *Bowerbank v. Walker*, 2 Chit. Rep. 519.

(*q*) *Wyatt v. Evans*, 3 Salk. 55, *per cur.*; *Bowerbank v. Walker*, 2 Chit. Rep. 519.

(*r*) See *ante*, 802; and *Smith v. James*, 6 T. R. 752.

(*s*) R. M. 1654, s. 22.

(*t*) See as to writs of error from inferior courts, *ante*, Vol. I. p. 385.

(*u*) 32 G. 3, c. 68, s. 1: see Wareing's Practice C. P. L. 249.

(*v*) See *Rowell v. Breddon*, 3 Dowl. 324.

(*x*) See the form of the affidavit in this latter case, Chit. Forms, 566; of the rule, *Id.* 567; and of the *certiorari*, *Id.* 567. See *Jordan v. Cole*, 1 H. Bl. 532.

(*y*) *Doe Stansfield v. Shipley*, 2 Dowl. 408.

(*z*) *Bulmer v. Marshall*, 1 D. & R. 537.

(*a*) *Batten v. Squires*, 4 Dowl. 53.

(*b*) *Knowles v. Lynch*, 2 Dowl. 623.

and that a judge at chambers has no power to grant the writ (*c*). The rule, on application to the court, is absolute in the first instance (*d*). Where the original judgment was destroyed by accidental fire, the court ordered execution to issue on a verified copy of the judgment (*e*).

Removal of Judgments, Rules and Orders of Inferior Courts, where the judge is a barrister of seven years' standing, under 1 & 2 V. c. 110.] The twenty-second section of 1 & 2 V. c. 110, enacts, "that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing of this act a barrister of not less than seven years' standing shall act as judge assessor or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid whereby any sum of money or any costs, charges, or expenses shall be payable to any person, it shall be lawful for the judges of any of her majesty's superior courts of record at Westminster, or if such inferior court be within the county palatine of *Lancaster* for the judges of the Court of Common Pleas at *Lancaster*, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this act shall have recovered or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person or his behalf (*f*), and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule or order, as the case may be, being respectively under the seal of the inferior court and signature of the proper officer thereof, to order and direct (*g*) the judgment, or, as the case may be, the rule or order, of such inferior court to be removed into the said superior court or into the Court of Common Pleas at *Lancaster*, as the case may be; and immediately thereupon such judgment, rule, or order shall be of the same force, charge, and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said superior court, or into the Court of Common Pleas at *Lancaster*, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order: provided always, that no such judgment or rule or order when so removed as aforesaid shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior

Removal of Judgments, Rules and Orders of Inferior Courts where the Judge is a Barrister of Seven Years' Standing, under 1 & 2 V. c. 110.

(*c*) *Rowell v. Breddon*, 3 Dowl. 324.

(*d*) *Knowles v. Lynch*, 2 Dowl. 623.

(*e*) *Cheesewright v. Franks*, 6 Dowl. 471.

(*f*) See form of affidavit, in support of

the application, Chit. Forms, 569.

(*g*) See form of order, Chit. Forms, 539; form of affidavit in support of the application, Id.

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court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same" (*h*).

It may be observed, that this section does not contain the words on the construction of which it has been held that the 19 *G.* 3, c. 23, does not include to judgments against defendants. Also, that the application under this statute may be made to a judge at chambers, which was not the case under the 19 *G.* 3, c. 23. It applies to inferior courts of equity as well as law (*i*). The 2 & 3 *V.* c. 16, s. 28, contains a similar provision as to judgments in the Court of Pleas at Durham.

Removal of a Judgment, &c., in the Court of Common Pleas at Lancaster.

Removal of a Judgment, &c., from the Court of Common Pleas at Lancaster or Durham.] The 4 & 5 *W.* 4, c. 62, s. 31, enacts, "that whenever a plaintiff or defendant, in any action or suit in which judgment shall be recovered in the said Court of Common Pleas at Lancaster, shall remove his person or goods or chattels from or out of the jurisdiction of the said Court of Common Pleas at Lancaster, it shall and may be lawful for any of the superior courts at Westminster, upon a certificate from the prothonotary of the said Court of Common Pleas at Lancaster, or his deputy, of the amount of final judgment obtained in any such action, to issue a writ or writs of execution thereupon for the amount of such judgment, and the costs of such writ or writs and certificate, to the sheriff of any county, city, liberty, or place, against the person or persons or goods of the party or parties against whom such final judgment shall have been obtained, in such manner as upon judgments obtained in any of the said courts at Westminster" (*k*). Where a defendant, after judgment in an action in the Common Pleas at Lancaster, has removed his person out of the jurisdiction of the county palatine, a superior court, upon an *affidavit* of these facts, (without shewing that he has also removed his goods), will order a *capias ad satisfaciendum* to issue (*l*). And where a party against whom a judgment has been obtained in the Common Pleas at Lancaster has removed out of the jurisdiction, it is necessary, in order to obtain a writ of execution against him, to produce an *affidavit* of the fact of his removal (*m*). The 2 & 3 *V.* c. 16, s. 28, as to judgments in the Court of Pleas at Durham, contains a provision similar to that of 1 & 2 *V.* c. 110, s. 22, *ante*, 951.

Section 32 also enacts, "that, in case any rule of the said Court of Common Pleas at Lancaster cannot be enforced by reason of the non-residence of any party or parties within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule by the prothonotary of the said court, and an affidavit that by reason of such non-residence such rule cannot be enforced as aforesaid, to make such rule a rule of any one of the said courts at Westminster, if such court shall think

(*h*) See the forms of affidavit, order, and writs of execution on this section, Chit. Forms, 569 *et seq.*

(*i*) *Harvey v. Gilbert*, 7 Dowl. 616.

(*k*) See the forms, Chit. Forms, 568.

(*l*) *Lord v. Cross*, 4 Nev. & M. 30; 2 Ad.

& E. 61, S. C.: but see *Same v. Same*, 3 Dowl. Rep. 4.

(*m*) *Duckworth v. Fogg*, 2 C., M. & R. 736; 1 Tyr. & G. 172; 4 Dowl. Rep. 396, S. C.

fit, whereupon such rule shall be enforced as a rule of such court." The 2 & 3 *V. c.* 16, *s.* 29, contains a similar provision as to rules of the Court of Pleas at Durham.

CHAP. IV.

Removal of a Judgment, &c., from the Court of the Stannaries at Cornwall.] The 6 & 7 *W. 4, c.* 106, *s.* 11, for the improvement of the administration of justice in the Stannaries of Cornwall, contains provisions similar to those of the above act of 4 & 5 *W. 4, c.* 62, *s.* 31. But the provisions of the 6 & 7 *W. 4, c.* 106, apply only to judgments, orders, &c., on the law side of the court (*n*). And decrees on the equity side of the court can only be removed under the provisions of the 1 & 2 *V. c.* 110, *s.* 22, above noticed (*o*).

Removal of a Judgment, &c., from the Court of the Stannaries at Cornwall.

(*n*) *Harvey v. Gilbard*, 7 Dowl. 525, *Patteson, J.*

(*o*) *Harvey v. Gilbard*, 7 Dowl. 616, *Williams, J.*

CHAPTER V.

BOOK IV.
PART I.

CLAIM OF CONUSANCE.

In what Cases.

In what Cases.] INFERIOR courts of record (*a*) having a grant of "conusance of pleas," with or without exclusive words, may claim *conusance* if an action for a cause within their *conusance* be brought in a superior court (*b*). But *conusance* shall not be allowed when the franchise claiming it cannot give a remedy, and when, consequently, there would be a failure of justice (*c*); as in *quare impedit* (*d*), replevin (*e*), waste (*f*), or attaint (*g*); nor shall it be allowed after the cause has been removed from the inferior court by writ of error (*h*), or where the corporation or lord, to whom the franchise was granted, are themselves parties (*i*), or in *quo warranto* informations (*k*); nor shall it be allowed where the defendant is a stranger, not having any property within the franchise (*l*), or where the action here is against an heir on the bond of his ancestor, and he hath no assets within the jurisdiction of the inferior court (*m*); nor shall it be allowed, where the plaintiff is an attorney or officer of the superior court, and consequently privileged to sue there (*n*). The defendant's being in the custody of the marshal, however, does not oust the inferior court of its jurisdiction (*o*).

As to the species of actions in which *conusance* is allowed, it depends entirely upon the charter by which the franchise has been granted; the universities have *conusance* in personal actions only (*p*); in other cases the *conusance* is usually confined to local actions (*q*); but in all cases, the actions in which it is claimed must be such as were *in esse* at the time of the charter, and not subsequently created by statute (*r*).

When to be made.

When to be made.] *Conusance* must be claimed before the defendant has pleaded (*s*), and even before imparlance (*t*); and in cases where the cause of action appears in the writ, it must be claimed upon the return day of the writ (*u*).

(a) 2 Inst. 140: Co. Lit. 117. b.

(b) See 2 Bac. Abr., Courts, (D) 3: 1 Selton, 257: Hardr. 509, 510: Jennings v. Hankyn, Carth. 11: Davis v. Stringer, Carth. 354.

(c) 1 Ro. Abr. 489.

(d) 44 E. 3, 29 b: 26 E. 3, 73: Co. Lit. 134.

(e) 38 E. 3, 31: 2 Inst. 140: Bro. Conusance, 423.

(f) 1 H. 4, 5.

(g) Dy. 202. Keilw. 210: Co. Lit. 204.

(h) 50 Ass. 9.

(i) Bendl. 88, pl. 134: Day v. Savadge, Hob. 87.

(k) Keilw. 88 to 90.

(l) 22 Ass. 83.

(m) Brown v. Carrington, Cro. Jac 502; 2 Ro. Rep. 48.

(n) Lit. Rep. 40, 304: 3 Leon. 149: Jolliffe v. Langston, 1 Ld. Raym. 342: ante, 846.

(o) Bro. Conusance, 50: Jennings v. Hankyn, Carth. 12: Jones v. Bodeenor, 1 Ld. Raym. 135.

(p) See Lit. Rep. 352: Halley's case, Cro. Car. 87, 88: Thornton v. Ford & Serie, 15 East, 634: Williams v. Bricken-den, 11 East, 543.

(q) 4 Inst. 213: Tidd, 631.

(r) 14 H. 4, 20: see 22 E. 4, 23: 2 Bac. Abr., Courts, (D) 3.

(s) Wells v. Trehern, Barnes, 346.

(t) Welles v. Trahern, Willies, 233.

(u) Leasingby v. Smith, 2 Wils. 406, 413: Rex v. Agar, 5 Burr. 2820: see Browne v. Renouard, 12 East, 12.

How made.] The claim must be entered on a roll (*x*); and if the franchise were immemorial and not founded upon any express charter, a former allowance of it in the superior court or in eyre must be stated (*y*). Such allowance, or, in the case of an express charter or private statute, then the charter itself, or an exemplification of it under the great seal (*z*), or an exemplification (*a*), or copy (*b*), of the private statute, must be produced in court. Also, where the claim is made by one of the universities, a certificate of the chancellor of such university that the defendant is a resident member, and also an affidavit to the same effect, must be produced (*c*).

CHAP. V.
How made.

The claim is exhibited in court, and the motion is made that it be allowed. Then, upon the claim and the other documents above mentioned being read, the court grant a rule upon the plaintiff to shew cause why the conusance should not be allowed; and upon cause shewn or default made, the court make the rule absolute, or discharge it, as in ordinary cases (*d*).

Motion and Rule for Allowance of.

Conusance may be claimed by the bailiff of the franchise (*e*), or by the chancellor, vice-chancellor (*f*), or even the deputy of the vice-chancellor of either of the universities (*g*). If made by attorney, the letter of attorney must be produced in court and filed (*h*).

By whom made.

If conusance be allowed, a transcript of the record is sent to the inferior court; but the record itself remains in the superior court; and if the plaintiff afterwards cannot have justice done him in the court below, he may have a re-summons upon the record remaining in the superior court (*i*).

Record, how disposed of.

Re-summons.

(*x*) *Paternoster v. Graham*, 2 Str. 810; *Leasingby v. Smith*, 2 Wils. 409. See the form of the entry, *Browne v. Renouard*, 12 East, 15.

(*y*) *Foster v. Heram*, 1 Ld. Raym. 427; *Foster v. Mitton*, 1 Salk. 183; 9 Co. 27 b, 28 a.

(*z*) See *ante*, Vol. I. 219.

(*a*) See *Kendrick v. Kynaston*, 1 W. Bl. 454.

(*b*) See *ante*, Vol. I. 216.

(*c*) *Paternoster v. Graham*, 2 Str. 810.

(*d*) See *Browne v. Renouard*, 12 East, 12; see *Leasingby v. Smith*, 2 Wils. 409; Comb. 119.

(*e*) Bro. Conusance, 36, 50.

(*f*) *Williams v. Brickenden*, 11 East, 543.

(*g*) Hardr. 505.

(*h*) *Bishop of Ely's case*, 1 Sid. 103; 1 Lev. 87; and see *Williams v. Brickenden*, 11 East, 543; *Browne v. Renouard*, 12 Id. 12 to 15.

(*i*) 1 Sellon, 257; Tidd, 634.

CHAPTER VI.

CHANGE OF VENUE.

BOOK IV.
PART I.

IT should be premised that the court will, in some cases, noticed *ante*, Vol. I. 200, 201, order the issue or inquiry to be tried or executed in another county than that in which the venue is laid, but this practice is distinct from that of changing the venue.

How and in what Cases by Defendant, 956.

Into what Counties, 960.

How and in what Cases brought back on an Undertaking, &c., 961.

When brought back, and Rule discharged without an Undertaking, 962.

In what Cases changed by Plaintiff, 963.

How and in
what Cases by
Defendant.

On the com-
mon Affidavit.

How and in what Cases by Defendant.] LOCAL actions must be brought in the county in which the cause of action arose; transitory actions, in any county, at the option of the plaintiff. But if the plaintiff bring a transitory action in any other county than that in which the cause of action arose, the defendant upon application to the court or a judge founded upon an affidavit, "that the plaintiff's cause of action (if any) arose in the county of B., and not in the county of A.," (where the action is brought), "or elsewhere out of the said county of B.," can have the venue changed to the county where the cause of action really arose (*a*). The affidavit must expressly state that the action did not arise in the county in which the venue is laid, and that it did arise in the county to which the venue is sought to be changed, and not elsewhere, otherwise it will be insufficient (*b*). It may, it seems, be made either by the defendant or his attorney, though, as this does not appear expressly settled, it is safest to comply with the usual practice of having it sworn to by the defendant himself (*c*). In term, the rule to change the venue may be obtained from one of the masters, who, upon producing the above affidavit and the declaration, and a motion paper signed by counsel, will draw up the rule, which is absolute in the first instance (*d*). Draw up the rule with one of the masters, and serve a copy of it on the plaintiff's attorney or agent, who will thereupon alter the decla-

(*a*) See 1 Saund. 73, 74, n.: *Jones v. Pearce*, 2 Dowl. 54; Tidd, 9th ed. 609. See form of affidavit, Chit. Forms, 570.

(*b*) *Jones v. Pearce*, 2 Dowl. 54; *Palmer v. Terry*, 2 Dowl. 566; *Allen v. Griffiths*, 3 T. R. 495; *Walker v. Wright*, 4 East, 495.

(*c*) *Biddell v. Smith*, 2 Dowl. 219; see *King v. Turner*, 1 Chit. Rep. 58, 161.

(*d*) R. H., 2 W. 4, r. 103. By that rule, "In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance." The rule of T. T., 49 G. 3, (11 East, 273; 1 Chit. Rep. 691), requires that all rules for changing the venue shall be drawn up "on reading the declaration."

ration. In vacation you may obtain a judge's order to the same effect, which is granted, as of course, without summons, upon the production of the affidavit and declaration. The judge's order is taken with the affidavit, and a motion paper signed by counsel, to one of the masters, who will thereupon draw up the rule. The rule may be served at the same time as the plea (e).

This application cannot be made before the defendant has appeared (f). It may now, it seems, be made any time after declaration, and before the defendant has pleaded (g); but not after plea, (even a plea in abatement (h)), pleaded, unless under special circumstances (post, 958). It may be made after time has been obtained to plead, though upon terms of pleading issuably (i), unless expressly provided against by the order, or unless the order be upon the terms of taking short notice of trial (l), or upon "the usual terms" (l), whether or not the trial would be lost by the changing (m). If it is intended, therefore, to apply to change the venue, or if it is apprehended that such a course may be desirable, the defendant's attorney should introduce into the order for him the words "without prejudice to any application to change the venue;" or, if the plaintiff will not be materially delayed by changing the venue, the court or a judge may direct that the order for time should be amended in that respect (n). The court have refused to change the venue from London into a northern county in Hilary term, on the motion of the defendant, without an affidavit of merits (o). The motion cannot be made by defendant after a new trial granted (p). Also, where one defendant has allowed judgment to go by default, it may be doubtful if the court or judge would change the venue at the instance of the other defendant who had pleaded; for it might be imposing a hardship upon the former, to have damages assessed by a jury of a different county, without his assent (q).

At what Time applied for.

If the cause of action be such, that the above affidavit (*viz.* Where the Cause of Action arose in several Counties. that the cause of action, if any, arose in the county into which the defendant proposes to change the venue, and not elsewhere) cannot be made, the court or judge will not order the venue to be changed, unless under very particular circumstances, or by the consent of parties. Therefore, if the cause of action have arisen in two counties, as in an action for a libel

(e) *Phillips v. Chapman*, 5 Dowl. 250, Q. B.

(f) *Impey*, K. B., 271.

(g) *Smith v. Walker*, 8 Taunt. 169; 2 Moore, 64, S. C.; *Wigley v. Dubbins*, 4 Bing. 384; 12 Moore, 91, S. C.: see *Moses v. Stevenson*, 1 Taunt. 58; 3 B. & P. 13: see the former cases and law, *Asplin v. Gray*, 1 Str. 211; R. M. 1654, s. 5; *Wood v. Winch*, Barnes, 480; *Thomew v. Rand*, Id. 486; *Hayward v. Wells*, Id. 489.

(h) *Wigley v. Dubbins*, 12 Moore, 91; 4 Bing. 384, S. C.

(i) *Rowley v. Allen*, Willes, 318; *Wilson v. Harris*, 2 B. & P. 320; *Petyt v. Berkeley*, Cowp. 511.

(k) *Shipley v. Cooper*, 7 T. R. 698; *Nun v. Taylor*, 1 Bing. 186; 7 Moore, 598, S. C.; *Gitton v. Randell*, 1 M. & R. 142; *Waring v. Holt*, 3 Price, 3.

(l) *Russell v. Hurst*, 1 C. & M. 184; *Waring v. Holt*, 3 Price, 3; *Brettargh v.*

Dearden, M'Clel. & Y. 106.

(m) *Notts v. Curtis*, 1 Dowl. 319; 2 C. & J. 345, S. C.; *Tonks v. Fisher*, 2 Dowl. 22; *Shipley v. Cooper*, 7 T. R. 698; *Petyt v. Berkeley*, Cowp. 511; and see *Ford v. Gainer*, Sayer, 207; *Nun v. Taylor*, 1 Bing. 186; 7 Moore, 598, S. C.

(n) *Notts v. Curtis*, 2 C. & J. 345; 1 Dowl. 320, S. C.: and in a case in the Exch., (H. T., 1833), an action of assault and false imprisonment, the court allowed an amendment of the judge's order in the above respect, where the plaintiff had laid the venue, and given notice for trial in London, to enable the defendant to change the venue, so as to try the cause at the assizes.

(o) *Walton v. Hutton*, 1 Chit. Rep. 14.

(p) *Palmer v. Marshall*, 1 Dowl. 256; 1 Moo. & Sc. 252; 8 Bing. 155, S. C.

(q) See *Eccles v. Holland*, 4 Moo. & Sc. 233; *Groves v. Thackery*, 5 Taunt. 631.

BOOK IV.
PART I.In what Ac-
tions on the
common Affi-
davit.

published in two or more counties (*r*), or written in one and published in another county (*s*), the court or judge will not change the venue (*t*); but where the libel was written and published in one county (*u*), or written here and published in Germany (*x*), the venue was allowed to be changed to the county where the libel was written.

In an action for criminal conversation, the court have allowed the venue to be changed, upon the usual affidavit (*y*); so in an action for an assault (*z*), or for negligence in driving, &c. (*a*). But in an action on the case for running down a ship, it has been held that the venue cannot be changed, unless some special ground be alleged (*b*). So the venue may be changed in all actions upon contracts not under seal (*c*), with the exception of actions on bills of exchange and promissory notes, to which the idea of locality cannot attach (*d*); and also, except in an action on a charter-party, or policy of insurance (*e*), or other instrument, though not under seal (*f*), if the declaration be special on the written instrument, and the instrument be not merely incidental to the action, as an I. O. U., or the like (*g*). If the declaration contain one count on a cause of action, in respect of which the venue cannot be changed, the insertion of other counts on causes of action, in which the venue can be changed, will make no difference (*h*). It cannot be changed in debt for rent (*i*), or in an action on an award (*k*), or on a specialty (*l*), or in covenant (*m*). Yet, in covenant, where a view was necessary, the court allowed the venue to be changed to the county in which the premises were situate (*n*), though, in another case, it was refused (*o*). And in other cases, on specialties or written instruments, under special circumstances, the court will change the venue after issue joined, but not in general before (*p*). There are some other cases, also, in which the court or judge will not allow the venue to be changed, unless upon special grounds; as in actions for *scandalum magnatum* (*q*), actions against car-

(*r*) *Pinkney v. Collins*, 1 T. R. 571; *Hobart v. Wilkens*, 1 Dowl. 460; *Clementson v. Newcombe*, 3 Dowl. 425.

(*s*) *Clissold v. Clissold*, 1 T. R. 647; *Hitchon v. Best*, 1 B. & B. 299.

(*t*) See 2 Saund. 5 e; *Neale v. Neville* 6 Taunt. 565; *Cameron v. Gray*, 6 T. R. 363; *Robson v. Blackwell*, 2 Dowl. 645.

(*u*) *Freeman v. Norris*, 3 T. R. 306.

(*x*) *Metcalfe v. Markham*, 3 T. R. 652; but see *Walker v. Wright*, 4 East, 495.

(*y*) *Guard v. Hodge*, 10 East, 32.

(*z*) *Shepherd v. Hall*, 2 Chit. Rep. 417.

(*a*) *Williams v. Land*, 4 Taunt. 729.

(*b*) *Flecke v. Godfrey*, 1 T. R. 782, n. But it does not appear from the report where the accident took place.

(*c*) *Kirke v. Broad*, Say. 7; *Howarth v. Willett*, 2 Str. 1180; *Watkins v. Towers*, 2 T. R. 275; *Roberts v. Wright*, 1 Dowl. 294; 1 C. & J. 547; 1 Tyr. 552, S. C., which was an action on an I. O. U.: see *Morris v. Hurry*, 7 Taunt. 306.

(*d*) *Parmeter v. Otway*, 3 Dowl. 66; *Walthev v. Syers*, Id. 160; *Pinkney v. Collins*, 1 T. R. 571; *Evans v. Weaver*, 1 B. & B. 20; *Shepherd v. Green*, 5 Taunt. 576; *Smith v. Elkins*, 1 Dowl. 426.

(*e*) *Smith v. Stansfield*, 1 McClel. & Y. 212, per curiam.

(*f*) *Morrice v. Hurry*, 7 Taunt. 306.

(*g*) *Pickard v. Featherstone*, 4 Bing. 39;

12 Moore, 161, S. C.; *Slade v. Trew*, 2 Dowl. 65; 1 C. & M. 584, S. C.; *Roberts v. Wright*, 1 Tyr. 532.

(*h*) *Parmeter v. Otway*, 3 Dowl. 66; *Walthev v. Syers*, Id. 160; 1 C., M. & R. 596, S. C.; *Dawson v. Bowman*, 3 Dowl. 160; 1 C., M. & R. 594, S. C.; *Hart v. Taylor*, 2 D. & R. 164; *Arden v. Mornington*, 4 Tyr. 56.

(*i*) *Duplessis v. Chalk*, 2 Str. 878.

(*k*) *Whitburn v. Staines*, 2 B. & P. 355; *Stanway v. Hislop*, 4 D. & R. 635; 3 B. & C. 9, S. C.

(*l*) *Foster v. Taylor*, 1 T. R. 781; *Watt v. Daniel*, 1 B. & P. 425; *Youde v. Youde*, 4 Dowl. 32; 3 Ad. & El. 311, S. C.; and see *Anon.*, 1 Sid. 87.

(*m*) *Bohrs or Maude v. Sessions*, 1 C., M. & R. 86; 2 Dowl. 699, S. C.; see *Weatherby v. Goring*, 3 B. & C. 552; 5 D. & R. 441, S. C.

(*n*) *Hodinott v. Cox*, 8 East, 268.

(*o*) *Anon.*, 2 Chit. 419.

(*p*) *Bohrs or Maude v. Sessions*, 1 C., M. & R. 86; *Cockerill v. Dixon*, 1 C. & M. 661; *Parmeter v. Otway*, 3 Dowl. 66; *Youde v. Youde*, 4 Dowl. 32; 3 Ad. & El. 311, S. C. See cases referred to in notes, *infra*.

(*q*) 2 Ld. Raym. 1418; *Duke of Norfolk v. Alderton*, 2 Salk. 668; *Lady Falconbridge v. Forrest*, 2 Str. 807.

riers (*r*), actions for the infringement of a patent (*s*), and actions for escapes, or false returns (*t*).

Serjeants-at-law, barristers, attornies, and officers of the court, have the privilege of laying their venue in Middlesex (*u*); and the court or judge will not allow the defendant to change it, upon the usual affidavit (*v*); provided they sue in their own right (*x*), and not jointly with others (*y*). But if they lay the venue in any other county, they have no privilege as to retaining it (*z*). And a plaintiff, who becomes a barrister, *during* the action, cannot bring back the venue, though originally laid in Middlesex (*a*). And if an attorney sue by attorney, he thereby waives his privilege as to venue (*b*). And none of the above persons can, as *defendants*, have the venue changed to Middlesex without the usual affidavit (*c*).

Persons privileged as to Venue.

Where a transitory action is brought in the county in which the cause of action arose, or in the other cases already mentioned, in which the venue cannot be changed upon the common affidavit, or in which, although it might have been so changed, yet the application has not been made in proper time, &c., the court will never change the venue, unless it is very evident, that from political excitement, or other causes, a fair and impartial trial cannot be had in the county where it is already laid (*d*); or, unless the witnesses on both sides live at a great distance from the place where the venue is laid, or unless the expense of trying the cause in the county where the venue is laid *very greatly* preponderates (*e*); or where a view is desirable for the furtherance of justice (*f*); or under other very special circumstances (*g*), as, for instance, where, in a country cause, the cause was not tried for defect of jurors, and the defendant was rendered by his bail, so that he would have been detained in prison till the following assizes, had not the venue been changed to Middlesex (*h*); or with the consent of parties (*i*). The mere circumstance of there being only twenty-nine special jurors in a county, is no ground for changing the venue (*k*). In these cases, it is not, it seems, in general, any answer to the application, that the defendant has given an

Change of Venue on special Grounds.

(*r*) *Heathcoat's case*, 2 Salk. 670.

(*s*) *Brunton v. White*, 7 D. & R. 103; *Anon.*, 2 Chit. Rep. 418; 6 T. R. 363.

(*t*) *Anon.*, 2 Salk. 669, 670.

(*u*) Notwithstanding the 2 W. 4, c. 39, this privilege still exists, (*ante*, 846), but he must sue in person, as an attorney. (*Lowless v. Timms*, 3 Dowl. 707).

(*v*) *Pope v. Redfearne*, 4 Burr. 2027; 2 Snow, 242, 176; *Burroughs v. Willis*, 2 Str. 822; *Knight v. Barnaby*, 2 Ld. Raym. 1253; 2 Salk. 670, S. C.; *Pye v. Leigh*, 2 W. Bl. 1065; *Downes v. Brian*, Id. 993.

(*w*) See *Newton v. Rowland*, 1 Salk. 2.

(*y*) See *ante*, 846; *Newton & Wife v. Harland*, 6 Dowl. 630.

(*z*) *Lewis v. Shelley*, 7 Taunt. 146.

(*a*) *Newton v. Harland*, 6 Dowl. 630.

(*b*) *Lowless v. Timms*, 3 Dowl. 707.

(*c*) *Yearley v. Roe*, 3 T. R. 573; *Pope v. Redfearne*, 4 Burr. 2028; and see *Lewis v. Shelley*, 7 Taunt. 146; *ante*, 847.

(*d*) See *Mayor of Poole v. Bennet*, 2 Stra. 874; *Petyt v. Berkeley*, Cowp. 510; *Rex v. Harris*, 3 Burr. 1333; *Mylocke v. Saladine*, Id. 1564; *Mayor &c. of Bristol v. Proctor*, 1 Wils. 298; *Hill v. Payne*, 3 Dowl. 695; *Thornton v. Jennings*, 5 Bing. N. C. 485; 7 Dowl. 449, S. C.; *Morris v. The Duke*

of Norfolk, Exch., 22nd November, 1830.

(*e*) *Alcock v. Cook*, 6 Bing. 733; 4 Moo. & P. 573, S. C.; *Johnson v. Nevison*, 2 Dowl. 260; and see *Foster v. Taylor*, 1 T. R. 781; *Evans v. Weaver*, 1 B. & P. 20; *Anon.*, 2 Chit. Rep. 418; *Ladbury v. Richards*, 7 Moore, 82; *Fenwick v. Farron*, 1 Chit. Rep. 334; *Crompton v. Stewart*, 1 Dowl. 567; 2 C. & J. 473, S. C.; 10 Price, 171.

(*f*) *Hodinott v. Cox*, 8 East, 268.

(*g*) See *Foster v. Taylor*, 1 T. R. 782; *Hodinott v. Cox*, 8 East, 268; *Keys v. Smith*, 10 Bing. 1; 3 Moo. & Scott, 338, S. C.; in which case defendant was a prisoner. Where the venue was laid in Yorkshire, and the witnesses from the nature of their occupation would necessarily be abroad at the time of the York assizes, the court granted a rule *nisi* to change the venue to London. (*Atkinson v. Sadler*, 2 Chit. 419).

(*h*) *Keys v. Smith*, 10 Bing. 1; 3 M. & Scott, 338; 2 Dowl. 210, S. C.

(*i*) *Mayor &c. of Bristol v. Proctor*, 1 Wils. 298.

(*k*) *Doe Lloyd v. Williams*, 5 Bing. N. C. 205.

BOOK IV.
PART I.

undertaking to try at the sittings (l). The affidavit to change the venue, under special circumstances, should state the nature of the cause of action, and of the defence thereto, and the grounds for the motion or application (m). And if the ground on which the venue is sought to be changed be, that the witnesses reside at a great distance from the place where the venue is laid, the affidavit should also state, that the defendant intends to examine witnesses (n), the number of those witnesses (o), and where they reside. The application should also, as a general rule, be made after issue joined, and not before (p). Where, however, the pleadings and facts of the case were such, that the court could not fail to see what the issues joined must be, and the only matter in dispute was as to costs, a change of venue was allowed before issue joined (q). The court, in granting the application, will, in general, impose on the applicant such terms, as to payment of costs or expenses (r), admissions (s), and other matters (t), as they consider just to the opposite party.

In local Actions.

We have seen (*ante*, Vol. I. 200) that by the 3 & 4 W. 4, c. 42, s. 22, the venue may be changed even in local actions where it is more convenient that the trial should take place in another county. The application to change the venue in this case cannot be made till after issue joined (u). In local actions, when an impartial trial cannot be had in the county where the action is brought, instead of moving to change the venue, it is more usual to apply for leave to enter a suggestion upon the issue, in order to have a trial in the adjoining county, as directed *ante*, Vol. I. 201.

Rule not a Stay of Proceedings.

A rule or order to change the venue does not, in general, operate as a stay of proceedings, and the parties are bound to take the next step as if no such order had been made (x).

Into what Counties.

Into what Counties.] When the venue is changed upon the common affidavit, it is always changed to the county in which the cause of action arose; when changed because a fair and impartial trial cannot be had in the county in which it is laid, it is usually changed to the next adjoining county; when changed for any other special cause, it is changed into such county as the circumstances of the case suggest. It may be changed to Chester (y), Durham, or Lancaster, and the record sent down by *mittimus* into the latter counties. The venue might, even before the 11 G. 4 & 1 W. 4, c. 70, be changed to a Welsh county (z); and if it be desired afterwards to have

(l) *Johnson v. Nevison*, 2 Dowl. 260: *sed vide Haythorn v. Birch*, 2 Id. 240.

(m) *Ladbury v. Richards*, 7 Moore, 82: see *Johnson v. Beresford*, 2 C. & M. 222. See a form, Chit. Forms, 554, 576.

(n) *Crompton v. Stewart*, 1 Dowl. 567; 2 C. & J. 473, S. C.: but see *per Littledale, J.*, 3 Dowl. 68.

(o) *Evans v. Weaver*, 1 B. & P. 20.

(p) *Youde v. Youde*, 4 Dowl. 32; 3 Ad. & El. 311, S. C.: *Cotterill v. Dixon*, 1 C. & M. 661: *Bohrs v. Sessions*, 1 C., M. & R. 86: *Weatherby v. Goring*, 3 B. & C. 552; 5 D. & R. 441, S. C.: *Parmer v. Otway*, 3 Dowl. 66: see *Foster v. Taylor*, 1 T. R. 781: *Mylocke v. Saladine*, 3 Burr. 1561: *Bayley v. Beaumont*, 11 Moore, 384: *Dowler v. Caller*, 7 Dowl. 55.

(q) *Dowler v. Collis*, 4 M. & W. 531; 7 Dowl. 56, S. C.: but not so clear as to the point in the text.

(r) See *Bouring v. Bignold*, 1 Dowl. 685, *per cur.*

(s) See *Holmes v. Wainwright*, 3 East, 329.

(t) See *Bouring v. Bignold*, 1 Dowl. 685, *per curiam*: *Evans v. Weaver*, 1 B. & P. 20.

(u) *Bell v. Harrison*, 2 C., M. & R. 733; 4 Dowl. 181, S. C.

(x) See *post*, 1045.

(y) *Godfrey v. Philpot*, 2 Ld. Raym. 1418: *Price v. Griffith*, 1 Wils. 222; which cases were decided before the 1 W. 4, c. 70.

(z) *Hopkins v. Lloyd*, 6 East, 355.

the cause tried in the next English county, it might be done by a suggestion upon the issue, as directed *ante*, Vol. I. 200(a). So it may be changed to a city; after which the party may on motion have a *venire* to the sheriff of the next adjoining county(b). In Michaelmas or Hilary term, however, the court will not, in general, change the venue to a county where there are no Spring assizes(c), unless with the consent of parties, or under special circumstances(d).

How and in what Cases brought back on an Undertaking, &c.] The plaintiff may bring back the venue to the county in which he has already laid it. But by *R. H., 2 W. 4, r. 103*, "the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid"(e). *The application in this case is to discharge the rule to change the venue, and is made as directed ante, 956, as to the latter rule(f)*. The application should, in strictness, be made before the venue has been altered in the issue under the rule to change the venue(g); yet the court have allowed it, even after the cause has been carried down to trial, and been made a *remanet* (h). In practice, however, it is usual to apply for this rule as soon as the rule to change the venue has been served. Sometimes the undertaking above mentioned may, as we shall presently shew, be dispensed with.

How and in what Cases brought back on an Undertaking, &c.

If the plaintiff fail in doing that which he has undertaken, namely, to give material evidence at the trial of some matter in issue arising in the county where the venue is laid, he shall be nonsuited(i), if the objection be taken at *Nisi Prius*(k). But it will be sufficient to prove any fact material to the cause that took place in the county, though it do not go to the entire cause of action(l); for instance, that the deed upon which the action is founded was enrolled within the county(m); or, in an action by the assignees of a bankrupt, to prove that the fiat of bankruptcy issued, and the bankruptcy was declared, in the county(n); or to prove that letters containing the promise on which the action is founded were put into the post-office in the county(o); or in an action for goods sold and delivered, to prove letters containing invoices of goods having been put into the post-office in the county at the time the goods were forwarded(p); or delivery of the goods in the county to a carrier for the defendant(q); or to prove, in an action for an escape, the issuing of the writ

What material Evidence, &c.

(a) See *Freeman v. Gwynn*, 2 W. Bl. 962.

(b) *Bird v. Morse*, 7 Taunt. 385.

(c) See *Moor v. Fearnhaugh*, 1 Wils. 138; 2 Str. 1258, S. C.; *Howarth v. Willett*, 2 Str. 1180.

(d) See *Fenwick v. Farrow*, 1 Chit. Rep. 334; Id. 14: *Howarth v. Willett*, 2 Str. 1180.

(e) See *Wood v. Perkes*, 2 B. & Ald. 618: *Powell v. Rich*, 7 Taunt. 178; 2 Marsh. 494, S. C., *semb. contra.*: and see *Hill v. Payne*, 3 Dowl. 695.

(f) See form of rule, Chit. Forms, 570.

(g) 1 Crompt. 114.

(h) *Bruckshaw v. Hopkins*, 1 Cowp. 409: see *Dickinson v. Fisher*, 2 Str. 858; Price, Notes, P. 177.

(i) *Santler v. Heard*, 2 W. Bl. 1031: see *Watkins v. Towers*, 2 T. R. 281; where

production of a rule to pay money into court was held to be material evidence, (where the venue was brought back to Middlesex), though not obtained till after the discharge of the rule to change the venue.

(k) *How v. Pickard*, 2 M. & W. 373; 5 Dowl. 606, S. C.

(l) See *Anon.*, 2 Chit. Rep. 418; and the cases in the following notes.

(m) *Peake*, Ev. 213.

(n) *Kensington v. Chantler*, 2 Moo. & Sc. 36: see *Clarke v. Reed*, 1 New Rep. 310, *contra.*

(o) *Smith v. Walker*, 8 Taunt. 169; 2 Moore, 64, S. C.

(p) *Linley v. Bates*, 2 C. & J. 659.

(q) *Powell v. Rich*, 7 Taunt. 178.

BOOK IV.
PART I.

on which the party was taken(*r*); or in an action on the warranty of a horse, that plaintiff's attorney wrote defendant a letter in the county, apprising him of the breach of warranty, and that the horse was standing at livery at the defendant's expense, coupled with an admission of the receipt of the letter in the county(*s*); or in an action against coach proprietors for negligence and injuring plaintiff, to prove that expense of medical attendance, &c., was incurred in the county(*t*); or, it seems, anything tending to increase the damages(*u*); or, perhaps, to prove that the cause of action arose abroad(*x*).

To what
Time the Un-
dertaking re-
fers.

It has been considered that the undertaking in the Common Pleas must be understood to have reference only to the evidence necessary to support the declaration, or any one material averment in it; and therefore, if the defendant confess and avoid the whole cause of action, or plead a tender to the whole declaration, the plaintiff will not be bound to produce at the trial the material evidence he undertook to give(*y*). But the undertaking in the Queen's Bench is different from that in the Common Pleas, and it must, it seems, have reference to the evidence necessary to support the *issue* joined between the parties, whatever it may be(*z*).

When
brought back
and Rule
discharged
without an
Undertaking.

When brought back and Rule discharged without an Undertaking.] The court or a judge will, under special circumstances, discharge the rule to change the venue, without the undertaking above mentioned. Thus, when a fair and impartial trial cannot be had in the county to which it has been changed(*a*), or where the plaintiff would otherwise fail in the action(*b*), or if the cause of action arose in part in a foreign country, or in Ireland or Scotland(*c*), or if the venue ought not to have been originally changed(*d*), as where the action was on a bill of exchange(*e*), or the rule obtained after an order for time on the terms of taking short notice of trial(*f*), or if the affidavit upon which the venue was changed be defective(*g*), or the like, the court or a judge will discharge the rule to change the venue, without any undertaking. In other cases, however, such undertaking will not be dispensed with, even although it be shewn that the affidavit upon which the venue was changed is false(*h*).

Where a rule for changing the venue has been obtained on the common affidavit, in a case in which the venue can only be changed on special grounds, and a rule is obtained for bringing back the venue, it will be no answer to the latter rule

- (*r*) *Neale v. Nevill*, 6 Taunt. 565.
 (*s*) *Collins v. Jenkins*, 4 Bing. N. C. 225.
 (*t*) *Curtis v. Drinkwater*, 2 B. & Ad. 169.
 (*u*) See *Collins v. Jenkins*, 4 Bing. N. C. 225.
 (*x*) *Gerrard v. De Roebeck*, 1 H. Bl. 280; *Neale v. Nevill*, 6 Taunt. 565: *sed quære*, since the R. H., 2 W. 4, s. 103?
 (*y*) *Cockerell v. Chamberlayne*, 1 Taunt. 518: and see *Soulsby v. Lea*, 3 Taunt. 86.
 (*z*) See *Phillips v. Chapman*, 5 Dowl. 250.
 (*a*) *Petyt v. Berkeley*, 1 Cowp. 510: *Doe Hurdman v. Pilkington*, 4 Burr. 2447.
 (*b*) *Amner v. Catell*, 5 Bing. 203; 2 Moo. & P. 367, S. C.
 (*c*) *Hope v. Bennett*, 2 N. R. 397; *M'Clure v. M'Keand*, 2 Taunt. 197.
 (*d*) *Clementson v. Neucombe*, 3 Dowl. 435: *Dawson v. Bowman*, 3 Dowl. 160: *Hobart v. Wilkins*, 1 Dowl. 461.
 (*e*) *Dawson v. Bowman*, 3 Dowl. 160.
 (*f*) *Petyt v. Berkeley*, Cowp. 510.
 (*g*) *Tidd*, 610: *Allen v. Griffiths*, 3 T. R. 495.
 (*h*) *Price v. Woodburne*, 6 East, 433: *Hunt v. Bridgeford*, 1 Taunt. 259: *Dick v. Norrish*, 3 Id. 464: *Powell v. Rich*, 7 Id. 178: *Wood v. Perkes*, 2 B. & Ald. 618: but see *Cailland v. Champion*, 7 T. R. 205.

to shew that there are special grounds for keeping the venue at the place to which it has been changed; but those grounds must be made the subject of an independent motion for changing the venue in the first instance (*i*).

In what Cases changed by Plaintiff.] In transitory actions, the plaintiff may lay his venue where he will; but if from circumstances he should afterwards desire to change it, he may obtain leave to amend his declaration, by altering the venue (*j*) upon stating to the court or judge a reasonable ground for the application (*k*); and this even after plea pleaded and issue joined (*l*), or even after the venue has been changed on the usual affidavit (*m*), or after a nonsuit on the trial, where it had been changed by plaintiff (*n*). In local actions we have seen (*ante*, Vol. I. 200) that the court or a judge may allow the trial or inquiry to take place in another county than that in which the venue is laid. And the court allowed a suggestion to be entered for this purpose in an action of trespass *quare clausum fregit*, where it was sworn that the defendant and others riotously and tumultuously assembled, and broke down the fences &c., without imposing any terms upon the plaintiff (*o*).

In what Cases
changed by
Plaintiff.

(i) *Dawson v. Bowman*, 3 Dowl. 160.

962, 963.

(j) *Stroud v. Tilly*, 2 Str. 1162; *Petre v. Craft*, 4 East, 433; *Dover v. Mestaer*, Id.

(l) *Cook v. Shone*, Barnes, 12: but see *Bird v. Foster*, Id. 19.

435.

(m) *Rivet v. Cholmondley*, 2 Str. 1202.

(k) *Ayres v. Buston*, 6 Taunt. 408. As to what are reasonable grounds, see *ante*,

(n) Price's Notes, P. Pr. 177: *sed quare?*

(o) *Jones v. Price*, 7 Dowl. 103.

CHAPTER VII.

BOOK IV. STRIKING OUT COUNTS, PLEAS, UNNECESSARY AVERMENTS, &c.
PART I.Striking out
unnecessary
Counts.

IF the declaration contain any unnecessary count, in violation of the rules which prohibit the use of several counts, the defendant may obtain a judge's order for striking it out at the plaintiff's cost, unless the plaintiff satisfies the judge that some distinct subject-matter of complaint is *bonâ fide* intended to be established in respect of such count; in which case the judge will specify on the summons, or order, as the case may be, the counts on which the plaintiff has satisfied him that a distinct subject-matter of complaint is proposed to be established; and if it should afterwards appear at the trial, and be certified by the presiding judge before final judgment, that no such distinct matter of complaint was *bonâ fide* intended to be established in respect of the count so allowed, the plaintiff will recover no costs upon any issue arising out of the count with respect to which the judge so certifies (*a*). These rules, and the proceedings to be taken under them, will be found fully noticed in the first Volume, p. 147—150. The superfluity of the counts may generally be collected from the particulars of demand, if any delivered; and such particulars should, in general, be obtained before making the application.

Superfluous
Matter.

If any part of a count be superfluous, such as unnecessary recitals, statements of venue (*b*), statements of title, descriptions of property, or the like, if the superfluous matter be of any length, the court or a judge, upon application, will in like manner order it to be struck out (*c*), and generally so at the plaintiff's cost. In an action against forty-six defendants, the court ordered the word "defendants" to be substituted for the names of the several defendants in the declaration, in all the places where they occurred, excepting the first (*d*).

Indecent or
scandalous
Matter.

So, if a declaration unnecessarily contain indecent or scandalous language, the court or a judge, upon application, will refer it to one of the masters, and direct them, if he report against it, to tax exemplary costs (*e*).

Reference to
Master.

The rule or order granted in these two latter cases is, either that the declaration be referred to one of the masters, (upon whose report the court will afterwards decide), or a rule upon the plaintiff to shew cause why the superfluous matter should not be struck out. It is seldom referred to the master, unless in the case of scandal and impertinence, or where the superfluous matter is so mixed up in the declara-

(a) R. H., 4 W. 4, r. 5, 6, 7, *ante*, Vol. I. 147—150: see Tidd, 9th ed., 616: Bagley's Pract. 257.

(b) *Fisher v. Snow*, 3 Dowl. 27: *Harper v. Champneys*, 2 Dowl. 680: *Townsend v. Gurney*, 3 Dowl. 168.

(c) 1 Sellow, 239: Tidd, 9th ed. 617: *Dundas v. Lord Weymouth*, Cowp. 665: *Price v. Fletcher*, Id. 727.

(d) *Meeke v. Oxlade*, 1 N. R. 289: see *Carmack v. Gundry*, 3 B. & Ald. 272.

(e) *Anon.*, 2 Wils. 20: Imp. B. R. 224.

tion as not to be easily separated and distinguished, or pointed out with distinctness to the attention of the court (*f*).

At what Time applied for.

The motion or application to strike out superfluous counts or matter should, unless some point of law be involved in it so as to warrant an application to the court (*g*), be made in the first instance to a judge at chambers (*h*). The application, if made to the court, must be founded on an affidavit, that they are for the same identical causes of complaint, or else the rule must be drawn up on reading the declaration (*i*). As to the time of the application, it should be made before plea pleaded; and from a case decided before the rules of *H. T.*, 4 *W.* 4, it appears that it ought to be made before the defendant has obtained time to plead (*k*); and, at all events, before the superfluous counts or matter are engrossed on the record (*l*). It is now, however, the practice to grant it, though made after time to plead granted. The application, if granted, will be with costs (*m*).

We have seen (*ante*, *Vol. I.* 146) that there are prescribed (by *R. T.* 1831) forms given as examples of declarations in actions on bills of exchange, notes, and on the common counts, and that they must not exceed the prescribed length, otherwise no costs of the excess will be allowed to the plaintiff if he succeed, and the costs of the excess incurred by the defendant will be taxed and allowed him, and be deducted from the plaintiff's costs; and, on the taxation of costs between attorney and client, no costs will be allowed the attorney in respect of such excess; and in case any costs be payable by plaintiff to defendant on account of such excess, the amount thereof will be deducted from the attorney's bill.

Forms given by R. T. 1831.

The rules above noticed (*ante*, 964) as to restraining the use of and striking out superfluous counts in a declaration, are also applicable to several pleas, avowries, or cognizances, which will not be allowed, and may, on application, be struck out, unless a distinct ground of answer or defence is intended to be established in respect of each, and as to which, see *ante*, *Vol. I.* 150.

Striking out unnecessary Pleas, &c.

Sometimes the court or a judge will order an improper plea to be struck out. (See *ante*, *Vol. I.* 167). If a plea be clearly frivolous, and put in for the mere purpose of delaying and harassing the plaintiff, the court or a judge will strike it out with costs, and allow the plaintiff to sign judgment (*n*). But they will not do this except in a plain case (*o*).

Improper or frivolous Pleas.

(*f*) *Bagley v. Watkins*, 1 Chit. Rep. 450.

(*g*) See *per Alderson, B.*, 4 Dowl. 223.

(*h*) *Ward v. Graystock*, 4 Dowl. 717.

(*i*) *Roy v. Bristow*, 2 M. & W. 241; 5 Dowl. 452; *Murph. & Hur.* 139.

(*k*) *Wilkins v. Perry*, Hardw. 129: see *Law v. Williamson*, Imp. C. P., 6th ed., 170.

(*l*) *Thomas v. Jackson*, 2 Bing. 453; 10 Moore, 152, S. C.

(*m*) *Lawrence v. Stephens*, 3 Dowl. 777.

(*n*) *Knowles v. Burward*, 2 Per. & D. 235: *Horner v. Keppel*, 2 Per. & D. 234:

Bradbury v. Evans, Exch., 25th Nov. 1839.

(*o*) *Horner v. Keppel*, 2 Per. & D. 234.

CHAPTER VIII.

BOOK IV.
PART I.

CONSOLIDATING ACTIONS.

In general.

IF two or more actions be brought by the same plaintiff, the same time, against the same defendant, for causes of action which might have been joined in the same action, the court, or a judge at chambers, if they deem the proceedings oppressive, will in general compel the plaintiff to consolidate them, and to pay the costs of the application(*a*). On a rule to shew cause why the proceedings in thirty-seven actions of ejectment, brought against the occupiers of so many houses in Sackville-street, should not be stayed, and abide the event of a special verdict in another action upon the same title, Lord *Kenyon* said, it was a scandalous proceeding; that all the causes depended on the same title, and ought to be tried by the same record; and the rule was made absolute(*b*). So, three actions against different persons for the same assault were ordered to be consolidated(*c*); but in another and similar case the application was refused(*d*). The court have refused to consolidate an action against husband and wife, and an action against the husband alone(*e*). And it seems that the rule will seldom be granted in penal actions(*f*). Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same attorney, the court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them, and that the witnesses were different(*g*). Where three actions were successively brought by the same plaintiff against the same defendant, upon three promissory notes which became due at different times, the Court of King's Bench refused to consolidate them(*h*). But, in a case at *Nisi Prius*, it was intimated by Lord *Tenterden*, C. J., that if a party sue on a bill of exchange, and, after the action is commenced, another bill accepted by the same defendant, of which the plaintiff is holder, is dishonoured, and he bring a second action on that, a judge at chambers would, on application being made, direct the two actions to be consolidated(*i*): this, however, seems questionable. It is purely a matter of discretion with the court to order actions to be consolidated; they will, in general, consolidate them, if they can be joined, and if it appear that they were brought separately for the purpose of vexation or oppression.

(*a*) *Cecil v. Briggs*, 2 T. R. 639: see *Benton v. Praed*, 1 Smith, 423.

(*b*) 2 Sellon, 144: *Doe v. Pulteney v. Cavan*, Imp. K. B. 731: and see *Grimstone v. Burgers*, Barnes, 176: *Doe v. Brenton*, 6 Bing. 469: but see *Smith v. Crabb*, 2 Str. 1149, *contra*, in which case, however, it does not appear, but that there was some satisfactory ground for bringing the several actions.

(*c*) *Prac. Reg.* 151: *Anon.*, 1 Chit. Rep. 709, n.; Barnes, 341: and see *Key v. Hill*, 2 B. & Ald. 596.

(*d*) *Catlin v. Elliott*, 1 Str. 420.

(*e*) *Swithin v. Vincent*, 2 Wils. 227.

(*f*) See *Benton v. Praed*, 1 Smith, 423.

(*g*) *Nicholls v. Lefevre*, 3 Dowl. 135.

(*h*) *Mussenden v. O'Hara*, Tidd's *Prac.* 614.

(*i*) *Oldershaw v. Tregwell*, 3 C. & P. 58

Where several actions are brought upon the same policy of insurance, the court or a judge, upon application of the defendants, will grant a rule or order to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs if the plaintiff should recover, together with such other terms as the court or judge may think proper to impose upon them(*k*). The rule or order may now be obtained, notwithstanding the plaintiff refuses his consent to it(*l*); and if the action which is tried be determined in favour of the plaintiff, the other defendants may (if necessary) obtain a stay of proceedings in their several actions, upon payment of the amount of their subscriptions and costs.

CHAP. VIII.

Actions on
Policy of In-
surance.

Formerly, it was thought that a consolidation rule bound the plaintiff as well as the defendant, and the court or judge could not, though fresh evidence had been discovered, permit the plaintiff to try the other actions(*n*). But now a different doctrine is established(*o*), the rule being for the benefit of the defendant. And in a late case, where actions against underwriters had been consolidated by rule of court, and the defendant had obtained a verdict in one, the court refused to restrain the plaintiff from trying a second cause included in the same rule, till the costs of the first were paid(*p*). The plaintiff, however, by proceeding in a second consolidated action, without applying to the court, loses the benefit of any terms which were imposed on the defendants by the consolidation rule(*p*).

Effect of the
Rule.

The court or judge, under circumstances, may open the consolidation rule for the defendant, and permit a second cause to be tried; if they do, they will in general extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits(*q*). Where a cause has been tried twice by special juries, and a verdict for the plaintiff returned on both occasions, the court will not open a consolidation rule for the trial of a second cause, unless it be shewn that the cause has not been fully brought before the jury(*r*).

Rule, when
opened.

Formerly, before the late rules of pleading were introduced, the consolidation was not granted until after plea pleaded; but latterly, the practice has been to consolidate at an earlier stage; and in a recent case, two actions having been brought by the same plaintiff against different defendants, on the same policy of insurance, the court consolidated them after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected(*s*). So that it

At what Tim
applied for.

(*k*) *Doyle v. Anderson*, 1 Ad. & El. 635; 4 Nev. & M. 873, S. C.

(*l*) *Hollingsworth v. Brodrick*, 4 Ad. & El. 646; 6 Nev. & M. 240, S. C. See the form of the rule in this case, 6 Nev. & M. 243, n.; Chit. Forms, p. 578. See *Ohrly v. Dunbar*, 1 Nev. & P. 244. And see the former practice, Park, Ins. Introd.

(*n*) *Doyle v. Douglas*, 4 B. & Ad. 544.

(*o*) See *M'Gregor v. Horsfall*, 4 M. & W. 320.

(*p*) See *Long v. Douglas*, Id. 545, n.

(*q*) *Cohen v. Bulkeley*, 5 Taunt. 165.

(*r*) *Foster v. Allenby*, 5 Dowl. 619; 3 Bing. N. C. 896, S. C., nom. *Foster v. Alves*, Vaughan, J., diss.

(*s*) *Hollingsworth v. Brodrick*, 4 Ad. & El. 646; 6 Nev. & M. 240, S. C.

BOOK IV.
PART I.

How applied
for.

Application
for Leave to
sign Judg-
ment in Ac-
tions not
Tried.

Costs on Pay-
ment into
Court.

seems the actions may now be consolidated at any time after appearance, though before declaration.

The application for the consolidation rule is to be made to the court or to a judge. If made to the court, *draw up a motion paper, inserting thereon or in it the titles of the several causes; and indorse on it the counsel's name, requiring him "to move for a rule to shew cause why the within actions should not be consolidated."* If made to a judge, *there is no need for a motion paper, and a summons will suffice, which should be intitled in the several causes, and be "for the plaintiff to shew cause why the within actions should not be consolidated."* The rule is made absolute, or an order made, as above mentioned (t).

After verdict for plaintiff, (if the actions have been consolidated by order), and judgment signed thereon, take out a summons before a judge, and obtain his order to enter up judgment, in the several other actions which were consolidated, and that the plaintiff be at liberty to sue out execution thereon; also, that one of the masters may tax the costs in all the causes, and that the defendant may also pay the costs of the application to be taxed. You must sign judgment, tax your costs, and sue out execution, (according to the terms of the order), as in other cases. Formerly it was usual to make a motion to the court for this purpose, but now a judge will make the order at chambers, as above noticed.

By *R. H.*, 2 *W.* 4, r. 104, "Where money is paid into court in several actions, which are consolidated, and the plaintiff without taxing costs proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court" (u).

(t) See forms, *Chit. Forms*, 577, 578.

(u) See this rule noticed *post*, 976.

CHAPTER IX.

PAYMENT OF MONEY INTO COURT.

CHAP. IX.

General Observations as to.

WHEN a person is satisfied that he is indebted to another, upon a claim for a sum certain, or capable of being ascertained by mere computation, but disputes the amount claimed of him, then before action brought he may tender to his creditor the sum which he admits he owes, and then plead the tender in bar of the action. Or, after action brought he may, even though the claim be for an unliquidated amount, apply to a judge to stay the proceedings, upon payment of the sum the defendant admits to be recoverable, and to shew cause why, upon default of plaintiff's accepting it, he should not pay to defendant his costs subsequent to the application, if the plaintiff afterwards accepts that sum in satisfaction, as noticed *post*. Or, after action brought, and after, or in some cases before, declaration (*a*), he may, as subsequently pointed out in this Chapter, pay that sum into court, and plead the payment of it, and let the plaintiff afterwards proceed in the action at his peril. But if neither the existence of the debt, nor the amount claimed, be controverted, the defendant should pay the sum indorsed on the writ within four days of the execution of it, or after that time should apply to a judge for an order to stay the proceedings, upon payment of debt and costs, as directed in the next Chapter. In all cases where there has been a *tender*, but there is some doubt as to its sufficiency, it is safest to pay the money into court without pleading the tender (*b*), for though the payment of money into court subjects the defendant to costs up to the time of paying it in, if the plaintiff do not proceed further, nevertheless, if the defendant plead a tender, and plaintiff take issue thereon, and the defendant fail in proving it, he will thereby, at all events, subject himself to the costs of the trial and the general costs of the cause. We will proceed to consider, under the following heads, the practice as to the payment of money into court.

In what Cases allowed, 969.

When and how paid in, 972.

Plea of, 973.

Replication and Subsequent Proceedings, 974.

Costs on, 975.

Effect of it as an Admission of the Cause of Action, &c., 978.

Payment into Court upon a Plea of Tender, 981.

Payment into Court in lieu of Bail, *id*.

In what Cases allowed.] Prior to the stat. 3 & 4 W. 4, c. 42, s. 21, the general rule was, as it still is, "that where the sum demanded is a *sum certain*, or capable of being ascertained by *mere computation*, without leaving any other sort of discretion to be exercised by the jury," the defendant may pay money

In what Cases allowed.
In general.

(a) *Post*, 972.

(b) See *per* Lord Tenterden, C. J., *Lea-*

therdale v. Sweepstone, 3 C. & P. 342.

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into court (*d*); and further, by that statute, "it shall be lawful for the defendant in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the superior courts where such action is pending, or a judge of any of the superior courts, pay into court a sum of money by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and the form of pleading, as the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct."

As the rule of *H. T.*, 4 *W.* 4, *r.* 18, *post*, 972, orders that no rule or judge's order to pay money into court shall be necessary, except in cases within the above act; but that the money may be paid in as of course, it becomes necessary, in the first place, to consider the cases in which money may be paid into court independently of that act.

In Assumpsit. As regards an action on promises, the general rule is, that where the breach is substantially for the non-payment of money (*e*), but not otherwise (*f*), money may be paid into court as of course; in other cases the defendant must obtain a rule or order to pay it in, as being within the above enactment of 3 & 4 *W.* 4, *c.* 42.

In Debt. In debt on simple contract, the defendant may pay money into court as of course (*g*); so, in debt for rent (*h*); so, in debt on a policy of insurance (*i*) or for non-residence (*k*). But generally, in debt on a record or specialty, he cannot do so as of course; because in these cases the amount of the debt is ascertained, and cannot be varied from by the jury in their verdict (*l*): the defendant's course in these cases is to apply to the court or a judge to stay the proceedings on payment of the debt or penalty and costs; as to which see *post*, 984. As to staying the proceedings on paying the penalty, &c., in a penal action, see *post*, 985.

In Covenant. In covenant, where the breach assigned is the non-payment of a sum of money, the defendant may pay money into court as of course (*m*), but not in other cases (*n*), as in an action for dilapidations or the like (*o*); and if the breach be not for non-payment of money, the defendant must obtain a rule or order to pay the money in, as being within the above enactment of 3 & 4 *W.* 4, *c.* 42.

In Actions ex Delicto. In trespass, the defendant cannot pay money into court as of course (*p*); nor can this be done even in trespass for

(*d*) *Hallett v. East India Company*, 2 Burr. 1120: and see *Hodges v. Lord Litchfield*, 9 Bing. 713; 3 M. & Scott, 201, S. C.

(*e*) *Gregg's case*, 2 Salk. 596.

(*f*) *Strong v. Simpson*, 3 B. & P. 15; 5 B. & Ald. 93: *Hatton v. Bolton*, 1 H. Bla. 299, n.: *Fail v. Pickford*, 2 B. & P. 234: *Hodges v. Lord Litchfield*, 3 M. & Scott, 201; 9 Bing. 713, S. C.

(*g*) *M^cQuillan v. Cox*, 1 H. Bl. 249.

(*h*) *Gregg's case*, 2 Salk. 596; Pr. Reg. 257.

(*i*) 19 G. 2, c. 37, s. 7.

(*k*) 57 G. 3, c. 99, s. 43.

(*l*) See *Leapidge v. Pongillione*, 2 Str. 890.

(*m*) *Gregg's case*, 2 Salk. 596; *Hallett v. East India Company*, 2 Burr. 1120: *Walnouth v. Houghton*, Barnes, 282, 284: 19 G. 2, c. 37, s. 7.

(*n*) *Fullwell v. Hall*, 2 W. Bl. 837.

(*o*) *Salt v. Salt*, 8 T. R. 47. But in a case before the 3 & 4 W. 4, c. 42, where the plaintiff in an action against his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations, the court held that the defendant might have that part of the demand struck out of the declaration, on payment of the sum claimed and costs. (*Smith v. King*, 3 M. & Scott, 799).

(*p*) *Squire v. Archer*, 2 Str. 906.

mesne profits(*q*); nor in case(*r*); nor in trover or replevin; and in these cases the defendant's course is, to obtain a rule or order to pay in the money, as being within the 3 & 4 *IV.* 4, c. 42. In trover, the court have in some cases allowed the defendant to bring into court the article for which the action was brought and costs. So, in ejectment they allow the defendant, and in replevin the plaintiff, to bring into court the amount of the rent, for the non-payment of which the ejectment is brought, or the distress was made, respectively. As in these cases, however, the parties pay in, not a part merely, but the entire sum alleged to be due, it will be more convenient to defer the consideration of them to the next Chapter, where we shall have to treat of the application to stay proceedings upon payment of debt and costs generally.

In actions by executors or administrators, the defendant may pay money into court, as in ordinary cases(*s*).

By Executors, &c.

As to payment of money into court in actions by the assignees of a bankrupt, when the defendant is sued within the time limited for the bankrupt to dispute the commission, &c., see *stat.* 6 *G.* 4, c. 16, s. 93(*t*).

By Assignees of Bankrupt.

Some statutory provisions expressly allow the payment of money into court in particular cases; thus, in actions against mail-coach contractors, stage-coach proprietors, or common carriers, for the loss of or injury to goods, the defendants may pay money into court as of course(*u*).

By Carriers.

In actions against justices of peace, or against officers of the excise or customs, for anything done by them in the execution of their respective duties, if they have not made a tender, or if they conceive the amends tendered to be insufficient, they may have leave to pay into court such sum of money as they shall think fit; and the same proceedings shall be thereupon had as in other cases of paying money into court(*v*). The same privilege is given to commissioners of bankrupt, by *stat.* 6 *G.* 4, c. 16, s. 43(*x*).

By Justices or Officers of Excise.

Commissioners of Bankrupts.

If there be two or more counts in a declaration, the defendant may pay money into court upon one of them, and plead it as in other cases(*y*). And it has been recently decided, that where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into court of one entire sum, in satisfaction of all the counts or breaches(*z*). And in a claim for unliquidated damages, it has been the practice to allow the defendant to plead payment into court, and in addition to any other plea to the whole claim(*a*); though the correctness of this practice may perhaps be doubted. The court, in a case decided before the rules of *H. T.*, 4 *W.* 4, refused to allow money to be paid into court on part of a count, where the

As to Part of the Declaration.

(*q*) *Holdfast v. Morris*, 2 Wils. 115.

(*r*) *White v. Woodhouse*, 2 Str. 787; *Squire v. Archer*, Id. 906; *Salt v. Salt*, 8 T. R. 47; *Bowles v. Fuller*, 7 T. R. 335; *Calvert v. Jolliffe*, 2 B. & Ad. 418.

(*s*) *Crutchfield v. Scott*, 2 Str. 796: see *Gregg's case*, 2 Salk. 596; *Bigland v. Robinson*, 3 Id. 105.

(*t*) Arch. Bkt. L. 259.

(*u*) 11 *G.* 4, 1 *W.* 4, c. 68, s. 10.

(*v*) See *ante*, 912, 913.

(*x*) Arch. Bkt. p. 10.

(*y*) See *Baillie v. Gazelet*, 4 T. R. 579; *Futwell v. Hall*, 2 W. Bl. 837; *Hallett v. East I. Comp.*, 2 Burr. 1120.

(*z*) *Marshall v. Whiteside*, 4 Dowl. 766; 1 M. & W. 188, S. C.; *Mitchell v. Townley*, 7 Ad. & El. 164: *semble*, overruling *Mee v. Tomlinson*, 5 Nev. & M. 624; 1 H. & W. 614, S. C.; and see *Jourdain v. Johnson*, 2 C., M. & R. 564; *Lorymer v. Vizeu*, 3 Bing. N. C. 222; *Noel v. Davis*, 4 M. & W. 136.

(*a*) See *Atkinson v. Duckham*, 4 Dowl. 327.

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claim was for unliquidated damages(*a*). They also in another case refused to allow a defendant to pay money into court upon some of the counts of a declaration, and demur to the rest(*b*).

By one of
several Defen-
dants.

It seems questionable whether one of several defendants alone can as of course pay money into court. And the Court of Common Pleas refused, before the rules of *H. T.*, 4 *W.* 4, to allow one of three defendants, who alone appeared, (one of the others having suffered judgment by default, and the other being outlawed), to pay money into court, even although he offered to pay all the costs up to that time(*c*). And it has been the practice since those rules to allow one of several defendants to pay money into court, unless under peculiar circumstances.

Taking out
Money impro-
perly paid in.

It was held before the 3 & 4 *W.* 4, c. 42, that if the defendant pay money into court, in a case where he is not allowed to do so, the plaintiff, by taking it out, would thereby waive the defect, and the effect of it will then be the same as if it had been paid in properly(*d*); but it may be questionable whether the same rule would now hold, since the payment must be specially pleaded, and the defect would appear on the face of the record.

When paid in.
Order for,
when made.

When and how paid in.] The court or judge may make an order for payment of money into court under 3 & 4 *W.* 4, c. 42, s. 21, in an action *ex delicto*, by way of amends, at any time, even immediately after the writ issued(*e*). And, as a matter of course, money may be paid into court in ordinary cases at any time after declaration(*f*), and before plea pleaded; or after plea, upon obtaining a judge's order to withdraw the plea, in order to pay money into court and plead it(*g*). Money has been allowed to be paid into court even after granting a new trial(*h*), and after setting aside the execution of a writ of inquiry(*i*). Where the money has been paid into court by leave of a judge before the time for pleading, the officer will write a receipt for it on the judge's order; and on the plea being afterwards brought to him, and the order produced with the receipt indorsed, he will transfer the receipt to the margin of the plea, in pursuance of *R. H.*. 4 *W.* 4, s. 18.

How paid in.

By rule of all the courts of *H. T.*, 4 *W.* 4, s. 18, "*No rule or judge's order to pay money into court shall be necessary, except under the 3 & 4 W. 4, c. 42, s. 21; but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.*" We have already considered in what cases money may be paid in as of course independent of that act, and in those cases by this rule no rule or order to pay the money in is requisite. In cases within that act, the rule or order must be obtained in the usual way by application to the court on motion, or by summons before a judge, usually the latter. As to when this order may be made, see *ante*, 972. *Serve a copy of the rule or order on the plaintiff's attorney or*

(*a*) *Hodges v. Lord Litchfield*, 3 Moo. & Scott, 201; 2 Dowl. 741, S. C.

(*b*) *Pr. Reg.* 256; 1 Sellen, 286.

(*c*) *Hay v. Panchiman*, 2 W. Bl. 1029.

(*d*) *Griffiths v. Williams*, 1 T. R. 710.

(*e*) *Edwards v. Price*, 6 Dowl. 467.

(*f*) See *Edwards v. Price*, Q. B., M. T. 1837; 1 Jurist, 866.

(*g*) *Griffiths v. Williams*, 1 T. R. 710, 711; *Tarlton v. Wragg*, 2 Str. 1271.

(*h*) *Anon.*, 1 Tidd, 9th ed. 672.

(*i*) *Day v. Edwards*, 1 Taunt. 491.

agent. Prepare a plea of the intended payment into court, and get it signed by counsel(j). Take the money and plea to one of the masters, who will write a receipt in the margin of the plea(k); (or if the money has previously been paid in by leave of a judge, he will transfer the receipt from the order to the plea on producing the order with the receipt indorsed. Deliver the plea to the plaintiff's attorney or agent, as in ordinary cases.

If interest be due, you should calculate it up to the time of the payment into court, and not merely to the commencement of the action(l).

Interest, how reckoned.

If the defendant find that he has not paid in a sufficient sum, the court or a judge will, in general, allow him to pay in a further sum upon payment of costs(m).

Paying in additional Sum.

When the defendant has previously paid money into court in lieu of bail, he may apply to have the sum paid in, or part of it, considered as so much paid in on account of the cause of action, and the order for this purpose is said to be of course(n). But the Court of Common Pleas has refused to permit this, either in the case of a plea of tender, or of payment into court(o).

Transferring Money paid in lieu of Bail.

Plea of.] By rule of all the courts of T.T., 1 V., it is ordered, amongst other things, that the 17th of the general rules and regulations made pursuant to the statute 3 & 4 W. 4, c. 42, s. 1, be repealed; and that in the place thereof, the following amended rule be substituted: *viz.*—

Plea of Payment into Court.

“When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis*:—

Form given by R. T., 1 V., and Decisions as to.

C. D. } The ——— day of ———, A.D. ———
ats. }
A. B. } The defendant, by ———, his attorney [or, in person, &c.], says [or, *in case it be pleaded as to part only, add,* “as to £——, being part of the sum in the declaration,” or, “—— count mentioned,” or, “as to the residue of the sum of £——”] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages [or, *in actions of debt,* “that he never was indebted to the plaintiff”] to a greater amount than the said sum, &c. in respect of the cause of action in the declaration mentioned [or, “in the introductory part of this plea mentioned”]: and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.”

Take care that the plea contains the receipt of the money by the officer in the margin, or the plaintiff may sign judgment as

(j) Post, 974.

(k) By statute 7 W. 4 & 1 V. c. 30, s. 9, the money must be paid in at the masters' office, and the masters must pay it into the Bank of England, to the credit of the “Suitor's Fund;” and the money is afterwards paid to the party entitled to it by a cheque on the Bank of England, signed by two or more of the masters.

(l) *Kidd v. Walker*, 2 B. & Ad. 705; 1 Dowl. 331, S. C.

(m) But see *Swan v. Freeman*, Barnes, 282: Pr. Reg. 263, 252.

(n) Price, New Prac. 304: see *Hubbard v. Wilkinson*, 8 B. & C. 496: but see *Bail v. Stafford*, 4 Dowl. 327.

(o) *Stultz v. Henage*, 10 Bing. 561; 4 Moo. & Scott, 472; 2 Dowl. 806, S. C.: and see *Balls v. Stafford*, 2 Scott, 426; 4 Dowl. 327; 1 Hodges, 316, S. C., where the Court of Common Pleas refused to allow money paid in in lieu of bail to be appropriated to a plea of payment.

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for want of a plea. The plea should be pleaded within the same time, and delivered in the same manner, as other pleas. (See ante, Vol. I. 152, &c.) As it concludes with a verification, it should be signed by counsel. If the defendant omit to plead this plea, he can, it seems, derive no benefit as to costs from the payment into court(o), and such payment into court must now, in all cases, be specially pleaded. If the plea begin "as to so much, parcel" &c., and conclude without any prayer of judgment, it is bad on special demurrer; also, if it is intended to defend part of the action, and to pay into court as to the other part, the plea or pleas in bar should be pleaded first, and the payment into court should be pleaded as to the residue(p). It is not a ground for judgment *non obstante veredicto*, and, it seems, not even a ground of demurrer, that the plea alleges the money to have been paid into court by leave of a judge before declaration(q).

Replication
and subse-
quent Pro-
ceedings.

Replication and Subsequent Proceedings.] By R. T., 1 V. (r), "The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed: or the plaintiff may reply, 'that he has sustained damages,' [or, 'that the defendant was and is indebted to him,' as the case may be], to a greater amount than the said sum; and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit(s).

The plaintiff may, at all events, without prejudicing his case, at once take the money out of court, which he may obtain on producing to one of the masters the copy of the rule or order (if any) for paying it in, and the plea of payment, delivered in the cause. The plaintiff must reply within the time limited in ordinary cases. If the plea of payment into court be to the whole declaration, and the plaintiff determines upon not accepting the money in satisfaction of his claim, he should reply that fact accordingly in the manner pointed out by the above rule, and make up the issue, and proceed to trial, &c., as in ordinary cases. If the plea be only to part of the declaration, and there be any other plea to the rest of it, and the plaintiff determines upon proceeding to trial upon the cause of action to which the plea of payment into court is not pleaded, he should reply that he accepts the money in satisfaction of that part of the cause of action to which it is paid in, (or, if he has sustained damages to a greater amount, then he should reply that fact), and he should reply to the other plea or pleas, and proceed to trial as in ordinary cases. If the plea of payment of money

(o) *Adlard v. Booth*, 1 Bing. N. C., 693; 1 Scott, 644, S. C.

(p) *Sharman v. Stevenson*, 2 C., M. & R. 75; 3 Dowl. 709; 1 Gale, 74, S. C.: and see *Porter v. Izat*, 1 T. & G. 639.

(q) *Edwards v. Price*, 6 Dowl. 487.

(r) See the former rule, H., 4 W. 4, r. 17, for which this is substituted.

(s) This rule supersedes that of H. T., 2 W. 4, r. 56, by which it was ordered,

that "on payment of money into court, the defendant shall undertake by the rule to pay the costs, and, in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages." And see the former practice, *Tidd's New Pract.* 315. See the forms, *Chit. Forms*, 581.

into court be to the whole of the declaration, and the plaintiff determines upon accepting the money in satisfaction of the cause of action, *he should reply that acceptance, and in that case he may at once proceed to a taxation of costs, and sign final judgment for them if not paid in forty-eight hours after taxation.*

If the plea be only to part of the declaration, and the plaintiff determines upon accepting the monies, and proceeding no further in the action, *he should then reply the acceptance of the money in satisfaction to the part of the cause of action to which it is paid in, and enter a nolle prosequi to the rest, and proceed to a taxation, &c., as just pointed out. The nolle prosequi need merely be inserted in the replication delivered. There is no occasion to enter it on any roll until the judgment-roll be carried in.* There is now no occasion for the defendant to produce at the trial the rule for payment of money into court, as formerly (*t*).

Costs on.] If the plea of payment into court be to the whole declaration, and the plaintiff replies that he accepts it in satisfaction of the cause of action, he will, in general, be entitled to his costs. If the plea be only to part of the declaration, and there be another plea or pleas to the rest, and the plaintiff is not willing to proceed further, he will then have to enter a *nolle prosequi* to that part of the cause of action to which the latter plea or pleas are pleaded, and be liable to the defendant's costs in respect of it. Where a defendant pleaded payment of money into court to the *whole* declaration, and also other pleas, it was held that the plaintiff might accept the sum paid in satisfaction of the whole cause of action, and tax his costs accordingly; and that, having done so, judgment of *nonpros* for want of a replication to the other pleas was irregular (*u*). But where payment into court was pleaded only to part, and there were other pleas to the rest, judgment of *nonpros* for want of a replication to the latter pleas was held to be regular (*v*). Where the defendant pleads a special plea, and plaintiff new assigns, and defendant pays money into court on the new assignment, and plaintiff takes it out in satisfaction of the action, the plaintiff is entitled to the costs of the writ, the defendant to all other costs prior to the new assignment, and the plaintiff to all subsequent costs (*x*). The plaintiff may, it should seem, at any time before the trial, if he choose not to proceed further, obtain the costs up to the time of the defendant's paying the money into court; but if the defendant has incurred any subsequent costs, he must be allowed them (*y*). Where in an action for dilapidations the defendant having paid money into court, the plaintiff replied further damage, and having subsequently given a peremptory undertaking, pursuant to which, however, he did not go to trial, the court permitted a rule for judgment as in case of a

(*t*) See the former practice, *Israel v. Benjamin*, 3 Camp. 41; 1 C. & P. 21, n.

(*u*) *Coates v. Stevens*, 3 Dowl. 784; 5 Tyr. 764; 1 Gale 75; 2 C., M. & R. 118, S. C.; see *Goode v. Goldsmith*, 5 Dowl. 288.

(*v*) *Topham v. Kidmore*, 5 Dowl. 676; *Ernest v. Standen*, 3 M. & W. 497; 6 Dowl.

591, S. C.

(*x*) *Griffiths v. Jones*, 1 M. & W. 731; 5 Dowl. 167, S. C.

(*y*) *Hartley v. Bateson*, 1 T. R. 629; *Griffiths v. Williams*, Id. 710; *Davis v. Mansell*, Willes, 191; and see *James v. Raggett*, 2 B. & Ald. 776; 1 Chit. Rep. 471, S. C.

Costs on.
In general.

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nonsuit to be discharged, on his amending his replication by accepting the money in satisfaction of the cause of action, and paying the costs incurred by the defendant since the payment of the money into court (*z*). If the money have been paid in on one count only of the declaration, the plaintiff (if he accept of the money so paid in) will be entitled to the costs of that count only, and not of the others (*a*); and if the money be paid into court on any one count, which may be applicable to the plaintiff's demand, and the plaintiff has no further demand, he will, it seems, proceed at his peril of costs on the other counts, notwithstanding they may be also applicable to the demand (*b*). If the plaintiff proceed to trial and obtain a verdict, he will be entitled to costs as in ordinary cases; but if the verdict be given against him, the defendant will be entitled to the costs (*c*). If a juror be withdrawn (*d*), or if plaintiff after proceeding in the action discontinue (*e*), or be nonsuit (*f*), or even if the defendant obtain judgment of *nonpros* or judgment as in case of a nonsuit (*g*); the plaintiff will be liable to costs as in other cases.

Costs, where several Actions are consolidated.

Formerly in the Queen's Bench, where the defendants in several actions on a policy of insurance paid money into court which the plaintiff took out without taxing costs at that time, and afterwards the defendants entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried, the court held, that the latter was not entitled to costs in any of the actions up to the time of paying money into court (*h*). But, in the Common Pleas, where there was a consolidation rule, and money paid into court, although the cause tried followed the general practice, and the defendant, if he succeeded, was entitled to the whole costs of that cause; yet the plaintiff was entitled to the costs of the short causes, up to the time when the money was paid in (*i*). And now by a general rule of all the courts of *H. T.*, 2 *W. 4*, *r. 1*, *s. 104*,—"Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into court."

When allowed to be paid in without Costs.

Under special circumstances, perhaps, the court or a judge may allow the money to be paid into court without the defendant's being liable to costs. In a case in the King's Bench, before the above rules of *H. T.*, 4 *W. 4*, although it appeared that a certain sum had been offered to the plaintiff before declaration, and refused, yet the court would not allow the defendant to pay that sum of money into court after declaration, upon the terms of the plaintiff's being obliged to relinquish the costs of the declaration if he afterwards took the

(*z*) *Kelly v. Flint*, 5 Dowl. 293.

(*a*) *Baillie v. Gezelet*, 4 T. R. 579; *Skarratt v. Vaughan*, 2 Taunt. 266.

(*b*) *Early v. Bowman*, 1 B. & Ad. 889; *Churchill v. Day*, 3 M. & Ry. 71.

(*c*) See *R. H.*, 1 V., *ante*, 974. See *Stevenson v. Yorke*, 4 T. R. 10; *Griffiths v. Williams*, 1 T. R. 710; *Stevenson v. Yorke*, 4 T. R. 10; 1 Saund. 33 c.

(*d*) *Stodhart v. Johnson*, 3 T. R. 657.

(*e*) *Berwick v. Symonds*, Say. 196.

(*f*) *Rabell v. Hudson*, 4 T. R. 10.

(*g*) *Crosby v. Olorenshaw*, 2 M. & Sel. 335; *Postle v. Beckington*, 6 Taunt. 158; but see *Seamour v. Bridge*, 8 T. R. 408; *Lorck v. Wright*, *Id.* 486.

(*h*) *Burstail v. Horner*, 7 T. R. 372; see *Powell v. Parkinson*, 6 M. & Selw. 107; *Tidd's New Pract.* 317.

(*i*) *Tweemlow v. Brock*, 2 Taunt. 361; and see *Wilton v. Place*, 2 B. & P. 56; *Muller v. Hartshorne*, 3 B. & P. 553.

money out; they said that the defendant should have tendered the money and pleaded the tender(*j*). But where the conduct of the plaintiff appeared to have been oppressive, and that the defendant was willing and offered to pay the money before action brought, the court, before the above rule of *H. T.*, 4 *W.* 4, upon application of the defendant, (even after he had paid the money into court), ordered, that so much of the rule then in practice as obliged him to pay costs, should be discharged(*k*). And where an action was brought for two separate sums of money, and the defendant, having offered to pay the amount of one of them, with costs up to that time, which was refused by the plaintiff, paid the amount into court, but the plaintiff afterwards finding that he could not maintain his action as to the second sum, took the money out of court, and proceeded no further: the court, upon application, allowed the defendant his costs from the date of his offer to pay the sum afterwards paid into court, and directed these costs to be deducted from the costs of the plaintiff(*l*). And in another case, the defendant obtained a judge's summons to stay proceedings, upon payment of a certain sum and costs; but the plaintiff claiming more than the sum offered, no order was made, and the action proceeded; the defendant afterwards paid the same sum into court, and the plaintiff thereupon took the money out and discontinued the action: the court, upon application of the defendant, allowed the plaintiff his costs only up to the time of his attendance upon the summons, and ordered the costs subsequently incurred by the defendant, and the costs of the application, to be deducted from them, even, although it appeared that the plaintiff was induced from poverty to accept the money paid into court, and relinquish his action for the balance(*m*). Where, in a country cause, the defendant took out a summons before declaration, to stay proceedings upon payment of a less sum than the plaintiff's demand and costs, upon which no order was made, and the defendant afterwards paid that sum into court, which the plaintiff's agent, having, in the meantime, consulted his principal in the country, took out of court, it was holden, that the plaintiff, not having been guilty of fraud or vexation, was entitled to costs up to the time at which he took the money out of court(*n*). Where an order was made for the defendant to pay four guineas into court, but the plaintiff's agent refused to tax the costs under that order, the Court of Exchequer permitted the defendant to pay the money into court without being liable to the costs(*o*). Where a defendant in a case before the *R. H.*, 4 *W.* 4, *r.* 17, and *R. H.*, 1 *V.*, paid into court 1*l.* 3*s.* 7*d.*, under an order which did not contain the usual undertaking

(*j*) *Burmester v. Hülch*, 13 East, 551: see Pr. Reg. 258: *Gibbon v. Copeman*, 5 Taunt. 840: but see *Zewin v. Cowell*, 2 Taunt. 203: *Roberts v. Lambert*, Id. 283.

(*k*) *Johnson v. Houlditch*, 1 Burr. 578: and see *Hale v. Baker*, 2 Dowl. 125.

(*l*) *James v. Raggett*, 2 B. & Ald. 776; 1 Chit. Rep. 471, S. C.: *Parsons v. Pitcher*, 4 Bing. N. C. 306; 6 Dowl. 432, S. C.: and see *Marryott v. Clapp*, 1 Dowl. 701: *Jones v. Owen*, 2 C. & J. 476; 1 Dowl.

565, S. C. It seems that the court will not interfere to give the defendant his costs unless the case has been previously before the master. (*Roe v. Cobham*, 6 Dowl. 628).

(*m*) MS., T. 1825: *Hale v. Baker*, 2 Dowl. 125: *semble*, overruling *Edwards v. Harrison*, 11 Price, 533: and see *Jones v. Owen*, note (*p*), p. 978.

(*n*) *Haworth v. Holgate*, 2 Y. & J. 257.
(*o*) *Anon.*, T. T. 1832, *Jervis's Rules*, 75.

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from the defendant to pay the costs, and it being doubtful whether the plaintiff, if he accepted that sum, would be entitled to costs, the defendant offered to give the plaintiff judgment of the term for that sum, in order to take the opinion of the court upon the question; the plaintiff, notwithstanding, took the cause to trial, and, upon the production of rule to pay money into court, had a verdict for one shilling; the Court of Exchequer, upon motion, ordered the plaintiff to pay to the defendant all costs incurred subsequently to the offer (*p*).

Defendant
may take Ad-
vantage of
Court of Re-
quests Acts.

By paying money into court, the defendant is not, it seems, precluded from the benefit of the Court of Requests Acts (*q*). Where, however, in an action to recover a sum of 8*l.* 2*s.*, (as claimed by the particulars of demand), the defendant paid 1*l.* 18*s.* into court, under the rule of *H. T.*, 4 *W.* 4, *r.* 19, which the plaintiff took out, in full satisfaction of the action, the cause of action arose, and the parties lived within the jurisdiction of the county court of Cardiganshire; and by order of a judge, the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed, with a view of depriving the plaintiff of his costs; the court set aside the order, on account of the form of the rule for paying money into court, the lateness of the application, and it not clearly appearing that the action was brought for less than forty shillings (*r*).

Effect of it as
an Admission
of the Cause
of Action, &c.

Effect of it as an Admission of the Cause of Action, &c.] By paying money into court, on the whole of a special declaration, or on the special counts, the defendant impliedly (*s*) admits the contract as declared on, and all the breaches on which it is paid in (*t*); and the only remaining question to be determined is the amount of the damages. By paying money into court on the common *indebitatus* counts, the defendant, in ordinary cases, admits no more than that the sum paid in is due to plaintiff, by virtue of some contract of the nature declared on; but it does not admit his liability on any particular contract on which the plaintiff may choose to rely (*u*); and it seems paying money into court on several counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only (*x*). As instances of what the payment admits, if money be paid into court on a count on a bill of exchange, there is no necessity to prove the defendant's handwriting (*y*), and the sufficiency of the stamp is thereby

(*p*) *Jones v. Owen*, Exch. T. T. 1832, Jervis's Rules, 75; 1 Dowl. 565; 2 C. & J. 476, S. C.

(*q*) *Turner v. Barnard*, 5 Dowl. 170; 1 H. & W. 580, S. C.

(*r*) *Farrant v. Morgan*, 3 Dowl. 792; 2 C., M. & R. 252; 5 Tyr. Rep. 790; 1 Gale, 156, S. C.

(*s*) *Burrough v. Skinner*, 5 Burr. 2640; *Guilod v. Nock*, 1 Esp. 347; *Seaton v. Benedict*, 5 Bing. 28; 2 Moo. & P. 66, S. C.; see *Boyfield v. Porter*, 13 East, 202; *Leggett v. Cooper*, 2 Stark. 103; *Everth v. Bell*, 7 Taunt. 450; *Stafford v. Clarke*, 2 Bing. 377; 9 Moore, 724, S. C.

(*t*) *Wright v. Goddard*, 8 Ad. & El. 144; 3 Nev. & P. 361, S. C.; *Hingham (or Kingham) v. Robins*, 7 Dowl. 352; 5 M. & W. 94, S. C., per Parke, B.

(*u*) *Hingham (or Kingham) v. Robins*, 7 Dowl. 352; 5 M. & W. 94, S. C.; overruling *Walker v. Rawson*, 1 M. & Rob. 250; and the dicta of Parke and Littledale, JJ., in *Meager v. Smith*, 4 B. & Ad. 673; see *Seaton v. Benedict*, 5 Bing. 28; 2 Moo. & P. 66, S. C.

(*x*) *Stafford v. Clarke*, 2 Bing. 377; 9 Moore, 724; 1 C. & P. 703, S. C.; *Everth v. Bell*, 7 Taunt. 450; 1 Moore, 158, S. C.

(*y*) *Gutteridge v. Smith*, 2 H. Bl. 374.

admitted(*z*): so, if paid in an action of covenant, the execution of the deed is admitted(*a*); so, if paid in on a count on a guarantee, it admits an agreement signed according to the Statute of Frauds(*b*); so, if paid in one entire contract, it admits the contract, though it would be otherwise if the contract were not entire(*c*); so, where two breaches are assigned in one count, payment into court on one of the breaches is an admission of the whole contract as set out in that count, so as to enable the plaintiff to recover on the second breach without proof of the contract(*d*). Where the declaration states a contract to pay a particular sum of money for certain articles, payment of part of the money into court on the special count, by admitting the contract, admits also the sum originally due; and the only question is, whether the remainder of the money had been previously paid(*e*). And in an action for goods sold by sample at a stipulated price, the payment of money into court therein precludes the defendant from insisting on the inferiority of the goods(*f*). But where the declaration is for goods sold, to be paid for at the average price, to be ascertained on a day specified, payment into court does not, if stated under a *videlicet*, admit the average price to be as stated in the declaration(*g*). And in an action for an attorney's bill, the defendant after payment into court may shew that the work was to be done for costs out of pocket, and not for an attorney's accustomed fees and charges(*h*). Nor does the payment into court on a count on a valued policy, in which the loss is averred to be total, admit of a total loss(*i*). In an action for goods sold and delivered, it admits a contract, though the goods were tortiously converted by the defendant(*j*). But it is not such an admission as precludes the defendant from taking an objection to the legality of the contract, in order to prevent the plaintiff from recovering beyond the sum paid in(*k*); and if the declaration contain a legal and an illegal demand, the money paid in shall be applied to the legal demand only(*l*). Payment of money into court, in an action upon the statute of *Ed. 6*, precludes the defendant from objecting to the plaintiff's title(*m*). In an action on a policy of insurance, the court, under particular circumstances, (where the plaintiff misled the defendant, and induced him to suppose that the only point to be tried is a question of fraud, &c.), allowed the defendant to give evidence of fraud notwithstanding he had paid money into court(*n*). It is a conclusive admission, in an indivisible claim, of the plaintiff's

(*z*) *Israel v. Benjamin*, 3 Camp. 40.

(*a*) *Randel v. Lynch*, 2 Camp. 357.

(*b*) *Middleton v. Brewer*, Peake, 15.

(*c*) See *Meager v. Smith*, 4 B. & Ald. 673; 1 Nev. & M. 449, S. C.

(*d*) *Dyer v. Ashton*, 1 B. & Cres. 3; 2 D. & R. 19, S. C.

(*e*) *Cox v. Brain*, 3 Taunt. 95.

(*f*) *Leggett v. Cooper*, 2 Stark. 103.

(*g*) *Stoveld v. Bretwin*, 2 B. & Ald. 116; and see *Everth v. Bell*, 7 Taunt. 450; 1 Moore, 158, S. C.; *Lechmere v. Fletcher*, 1 C. & M. 623.

(*h*) *Jones v. Reade*, 1 Nev. & P. 18; 5 Dowl. 216, S. C.

(*i*) *Rucker v. Palsgrave*, 1 Camp. 557; 1 Taunt. 419, S. C.

(*j*) *Bennett v. Francis*, 2 B. & P. 550; 4 Esp. 28, S. C.

(*k*) *Cox v. Parry*, 1 T. R. 464; and see *Shearwood v. Hay*, 5 Ad. & Ell. 383; *Wills v. Langridge*, Id.

(*l*) *Ribans v. Crickett*, 1 B. & P. 264.

(*m*) *Broadhurst v. Baldwin*, 4 Price, 58.

(*n*) *Muller v. Hartshorne*, 3 B. & P. 556; and see *Mellish v. Albutt*, 2 M. & Sel. 106; *Andrews v. Palsgrave*, 9 East, 325; *Rucker v. Palsgrave*, 1 Camp. 557.

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right to sue in the court in which the action is brought (o); and of his right to sue in the character in which he sues (p); but not of his right to sue alone without joining another party (q); also of the action not being brought too soon (r). But it is no admission of the plaintiff's right of action beyond the sum paid into court (s); and consequently, in a divisible claim, does not deprive the defendant of the benefit of the Statute of Limitations as to the residue of the plaintiff's demand (t). And if the declaration be on an *indebitatus assumpsit*, with particulars containing various causes of action, payment into court does not preclude the defendant from contesting his liability in respect of any items beyond the amount paid in, the particulars not being considered as part of the declaration (u).

Plaintiff, when entitled to nominal Damages, though other Issues found against him.

It should be observed, however, that where payment into court is pleaded, together with other pleas, each issue, as in other cases, must be tried by itself; and consequently, where the plaintiff replies damages *ultra*, and succeeds on that issue, although the defendant succeeds on all the other pleas, yet, unless the pleas on which he succeeds cover the entire cause of action, to which payment into court is not pleaded, the plaintiff will be entitled to a verdict for nominal damages on that plea (x); but if the issue found for the defendant goes to the entire cause of action, to which the payment into court is not pleaded, the admission in that plea will not entitle the plaintiff to have a verdict entered for him on the other issue (y).

Action for malicious Arrest after.

If the plaintiff take the money out of court, and it amount to less than the sum stated in the affidavit to hold to bail, the plaintiff does not, it would seem, thereby subject himself to an action for a malicious arrest (z).

Plaintiff may be Nonsuit after.

The plaintiff may be nonsuit after payment of money into court (a); but it is doubtful whether the defendant can demur to evidence after it (b).

Arrest of Judgment.

It seems the defendant cannot move in arrest of judgment for a defect in a breach, in respect of which he has paid money into court (c).

Money cannot be taken out by Defendant.

By the payment of money into court the defendant conclusively admits the plaintiff's right to it, and it can never afterwards be taken out, it seems, under any circumstances by him or his representatives, even though the plaintiff or defendant die in the course of the suit, or the plaintiff be nonsuit, or recover less than the amount paid in, or even although

(o) *Miller v. Williams*, 5 Esp. 19.

(p) *Lipscombe v. Holmes*, 2 Camp. 441.

(q) *Hingham (or Kingham) v. Robins*, 7 Dowl. 352; 5 M. & W. 94, S. C.; overruling *Walker v. Rawson*, 1 M. & Rob. 250; see *Ravenscroft v. Wise*, 1 C., M. & R. 203; 2 Dowl. 676, S. C.

(r) *Harrison v. Douglas*, 3 Ad. & El. 396.

(s) 2 Esp. Rep. 482, n.: *Blackburne v. Schoales*, 2 Camp. 341; *Rucker v. Palsgrave*, 1 Taunt. 419; *Everth v. Bell*, 7 Id. 450; *Stoveld v. Bretwin*, 2 B. & Ald. 116.

(t) *Long v. Greville*, 4 D. & R. 632; 3 B. & Cres. 10, S. C.: *Reid v. Dickons*, 5 B. & Ad. 499.

(u) *Booth v. Howard*, 5 Dowl. 438; 1 W. W. & D. 54, S. C.: see *Hingham (or Kingham) v. Robins*, 7 Dowl. 352; 5 M. & W. 94, S. C.

(x) *Fisher v. Aide*, 3 M. & W. 486.

(y) *Twemlow v. Askey*, 3 M. & W. 495.

(z) *Jackson v. Burleigh*, 3 Esp. 34; see *Hildyard v. Bowers*, 5 Esp. 69; *Butler v. Brown*, 1 B. & B. 66; 3 Moore. 327, S. C.: but see *Laidlow v. Cockburn*, 2 New Rep. 76.

(a) *Ante*, Vol. I. 313.

(b) *Jenkins v. Tucker*, 1 H. Bl. 93.

(c) *Wright v. Goddard*, 3 Ad. & El. 144; 3 Nev. & P. 361, S. C.

it was paid in by mistake (*d*). But the court may, if the plaintiff failed in his action, and the money has not been already taken out of court by him, impound it to answer the defendant's costs (*e*).

Payment of money into court did not, it seems, when paid in before the 3 & 4 W. 4, c. 42, entitle the plaintiff to reply at the trial (*f*).

Payment of Money into Court upon a Plea of Tender.] If you intend to plead a tender, pay the money tendered into court, in the manner directed ante, 972, 973, and get a receipt for it in the margin of the plea, from the master &c. A tender and refusal may be pleaded to an avowry or cognizance for rent or damage feasant, without bringing the money into court; for, if the distress be not rightfully taken, the defendant must answer to the plaintiff his damages (*g*); and it may be pleaded in this way to an action for an involuntary trespass (*h*), or in actions against magistrates (*i*), or excise or customs officers (*j*).

After paying money into court on a plea of tender, the defendant can never take it out, even although he have a verdict (*k*). But the plaintiff may take it out, whether he confess or deny the tender in his replication (*l*). The plaintiff had better confess the tender if it was a legal one, and the evidence that it was made be clear.

If the defendant plead a tender without paying the money into court, the plea, as far as it respects the tender, may be treated as a nullity; and the plaintiff may sign judgment for the amount of the tender pleaded (*m*).

Payment of Money into Court in lieu of Bail.] As to this, see ante, Vol. I. 613.

(*d*) *Vaughan v. Barnes*, 2 B. & P. 392: *Malcolm v. Fullerton*, 2 T. R. 645: see *Ward v. Lowring*, 2 Smith, 49: *Knapton v. Drew*, Barnes, 279: *Crockay v. Martin*, Id. 281: *Vane v. Michell*, Id. 284: *Elliott v. Callow*, 2 Salk. 597.

(*e*) See *Anon.*, Barnes, 280: and see *Green v. Coughlan*, 1 Jones, Rep. Exch. Ir. 283.

(*f*) See R. H., 15 Geo. 3, C. P.: 2 Taunt. 267.

(*g*) Gilb. Rep. 83, 179.

(*h*) 3 Chit. Pl. 6th ed. 975.

(*i*) Id. 974: ante, 912, 913.

(*j*) Id. 973: ante, 912, 913: see *Buhver v.*

Horne, 4 B. & Ad. 132; 1 Nev. & M. 117, S. C., in which it was held, that, if the tender were pleaded only to a particular count, the rule for paying the money into court on it should express that it was upon that count only, otherwise it would have the same effect as a rule for payment of money into court without the plea of tender. Now, however, in such a case there is no occasion for any rule or order to pay the money into court.

(*k*) *Cox v. Robinson*, 2 Str. 1027.

(*l*) *Le Grew v. Cooke*, 1 B. & P. 333.

(*m*) Vol. I. 169.

Right to Reply.

Payment of Money into Court upon a Plea of Tender.

How taken out.

Effect of not paying in the Money.

Payment of Money into Court in lieu of Bail.

CHAPTER X.

STAYING PROCEEDINGS.

<i>Upon Payment of Sum indorsed on Writ and Costs, 982.</i>	<i>Where there are adverse Claims, &c., 995.</i>
<i>Upon Payment of Debt, &c., and Costs, where the Amount is not disputed, 983.</i>	<i>Pending Criminal Proceedings, id.</i>
<i>Upon Payment of Debt, &c., and Costs, where the Amount is disputed, 987.</i>	<i>In Actions brought without Authority, id.</i>
<i>Upon Payment of Debt, &c., without Costs, 989.</i>	<i>Where the Attorney is uncertificated, &c., 996.</i>
<i>On Equitable Grounds, 990.</i>	<i>In Penal Actions by common Informers, id.</i>
<i>In second Actions for the same Cause, id.</i>	<i>In Actions by Outlaws and Alien Enemies, 997.</i>
<i>In trifling Actions, 994.</i>	<i>In Actions against Bankrupts, id.</i>
<i>In Actions pending Error, &c., id.</i>	<i>In other Cases, 997.</i>
<i>Pending a rule Nisi, &c., 995.</i>	

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Upon Payment of Sum indorsed on Writ and Costs.

Upon Payment of Sum indorsed on Writ and Costs.] IN an action for the recovery of a debt, we have seen (*ante*, Vol. I. 111) that the copy of the process served must be indorsed with the amount of such debt, and of what the plaintiff's attorney claims for the costs of such process, arrest, or service and attendance to receive debt and costs; and upon payment of such amount, *within four days*, to the plaintiff or his attorney, further proceedings will be stayed; the defendant having the liberty of afterwards getting the costs taxed, and if taxed at one-sixth less than stated on the copy of the process, the plaintiff's attorney will have to pay the costs of taxation(*a*). The payment of this amount, *within the four days*, will of itself operate as a stay of further proceedings. After that time, if the defendant dispute neither the cause of action nor the amount of the debt, he may, in the cases mentioned *infra*, stay further proceedings, by applying to a judge by summons, and obtaining his order for such stay of proceedings upon payment of the debt and costs. The defendant would not, on failing to pay the debt and costs within the four days, be entitled to a stay of proceedings on payment of the sum indorsed. The proceedings would only be stayed on payment of the debt and costs, assuming the debt to be more than the sum indorsed(*b*). Where the defendant, after the service of a writ of *summons*, paid the debt surreptitiously to the plaintiff's clerk, without costs, and the plaintiff's attorney, with a view to recover his costs, proceeded to deliver a declaration, the Court of Common Pleas ordered the proceeding to be stayed on payment of the costs of the writ of *sum-*

(a) R. H., 2 W. 4, r. 2: see *Ward v. Gregg*, 5 Dowl. 729.

(b) *Bowditch v. Slaney*, 4 Dowl. 140; 2 Scott, 197; 2 Bing. N. C. 142, S. C.

mons(c). Where the attorney demanded and obtained from defendant 5*s.* more than the sum marked on the writ, it was held that this 5*s.* could not be added to the sum taxed off, so as to entitle the defendant to costs(*d*).

Upon payment of Debt, &c., and Costs where the Amount is not disputed.] It may be laid down as a general rule, that the defendant will be allowed to stay proceedings upon payment of debt and costs, in all cases where at *common law* he may pay money into court. This is, however, a matter of favour to the defendant, and not of right; and therefore the court or a judge, in allowing it, may impose on the defendant such reasonable terms as they think proper(*e*). And, for the same reason, the court or a judge cannot, without the plaintiff's consent, allow the defendant a longer time for the payment than he would be entitled to by law(*f*).

Upon Payment of Debt, &c., and Costs where the Amount is not disputed.

In *assumpsit* for a money demand, the defendant may have the proceedings stayed upon payment of the sum demanded and costs(*g*). Where several actions are brought against the acceptor and indorsers of a bill of exchange, any of the parties, before judgment, may obtain a judge's order for a stay of the proceedings on payment of the debt and costs in the action against him, or, after judgment obtained in the action against him, may prevent execution from being sued out thereon, upon payment of the debt and costs(*h*). Formerly the acceptor of a bill of exchange, or the maker of a promissory note, could not obtain a stay of proceedings before judgment, except upon the terms of paying, not only the debt and costs in the action against him, but also the costs in all the other actions against the indorsers, &c. But now, by rule of all the courts of *T. T.*, 1 *V.*, "it is ordered that, in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings, on payment of the debt and costs in that action only." Even before that rule, where there was an attachment against the sheriff in an action against the acceptor, the sheriff might have been relieved on payment of the costs of that action only(*i*). And where, after the acceptor had offered to pay the debt and the costs of the action against himself, the plaintiff, who was an attorney and indorsee of the bill, brought another action against the drawer, who was his own client, the court stayed the proceedings upon payment of the debt and the costs of one action only(*j*). And the principle upon which this case was decided has been since acted on in several cases, where several actions have been brought against several real or fictitious parties to the bill, evidently for vexation and costs. If the bill has been paid by one of the other parties, the acceptor, if he contests his liability, may compel the plaintiff to proceed in the action; and where, in such a case,

In Assumpsit for a Money Demand. Where several Actions on the same Bill of Exchange, &c.

(c) *Wylie v. Phillips*, 3 Bing. N. C. 776.

(d) *Ward v. Gregg*, 5 Dowl. 729.

(e) *Jones v. Shepherd*, 3 Dowl. 421.

(f) *Kirby v. Ellison*, 2 Dowl. 219; 2 C. & M. 315; 4 Tyrw. 239. S. C.

(g) *Gibbon v. Cupeman*, 5 Taunt. 840.

(h) *Smith v. Woodcock*, 4 T. R. 691: per

Lord Tenterden, in *Dawson v. Morgan*, 9 B. & Cres. 620: and see per Parke, B., in *Jones v. Shepherd*, 3 Dowl. 421.

(i) *Rex v. Sheriffs of London*, 2 B. & Ald. 192: *Ball v. Blackwood*, 6 Dowl. 589.

(j) *Hodson v. Gunn*, 2 D. & R. 57.

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In Debt.

the plaintiff obtained a judge's order to stay proceedings, without costs, the court set aside the order(*k*).

So, in debt on simple contract, the proceedings may be stayed on payment of debt and costs. So, in debt for rent(*l*). So, in debt on bond in a penal sum, conditioned for the payment of a less sum, the defendant may bring into the court the principal and interest(*m*), and also, it seems, such costs as have been expended in any suit in law or equity concerning the same(*n*), which shall be deemed and taken to be in full satisfaction and discharge of the said bond(*o*). So, in debt on bond conditioned for the payment of an annuity, or of money by instalments, the defendant may obtain a stay of proceedings, upon payment of the arrears and costs, provided he give the plaintiff judgment in the action as a security for the future payments(*p*), but not otherwise(*q*); but where the bond was conditioned for the payment of a sum in gross, and by a subsequent agreement that sum was to be paid by instalments, the court would not stay proceedings on the bond upon payment of the instalment, but required the defendant to pay in the whole sum mentioned in the condition of the bond, with costs(*r*); and the same where it was expressly stated in the bond that the whole sum should become due upon default made in the payment of any one instalment(*s*). In these cases the application is for a rule to shew cause why it should not be referred to one of the masters to compute the principal and interest due upon the bond (as the case may be); and why, upon payment of such sum with costs to be taxed, &c., the proceedings in the action should not be stayed. So, in debt on bond conditioned to perform covenants, or for the performance of any specific act, the defendant may obtain a stay of proceedings upon payment of the penalty of the bond and costs(*t*). So, in debt on bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, where no suit for foreclosure or redemption is depending, a payment to the mortgagee, or, in case of his refusal, a payment into court, of principal and interest due on the mortgage, and costs, shall be deemed to be in full satisfaction of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly(*u*). As to staying proceedings in debt on replevin-bond, see *ante*, 812. As to staying proceedings in debt on bail-bond, see *Vol. I.* 568. As to staying proceedings against bail upon their recognisance, see *Vol. I.* 618, &c. So, in debt on judgment, the court will stay proceedings, upon payment of the sum recovered by the judg-

(*k*) *Lewis v. Dabrymple*, 3 Dowl. 433.

(*l*) *Lee v. Irish*, Hardw. 173.

(*m*) See *Farquhar v. Morris*, 7 T. R. 124; *Hogan v. Page*, 1 B. & P. 337. It seems that both principal and interest must be brought in, though the principal be payable on a future day, and the breach be only in payment of interest. (See *Vansandau v. —*, 1 B. & Ald. 214).

(*n*) *Locke v. Shermer*, Hardw. 116: see *vide Sinney v. Nevinson*, 2 Str. 699.

(*o*) 4 & 5 A. C. 16, s. 13. See *Bonafous v. Rybot*, 3 Burr. 1373; *Lord Lonsdale v. Church*, 2 T. R. 388; *Wilde v. Clarkson*, 6 T. R. 303.

(*p*) *Darby v. Wilkins*, 2 Str. 957; *Bridges v. Williamson*, Id. 814; *Bonafous v. Rybot*, 3 Burr. 1370.

(*q*) *Vansandau v. —*, 1 B. & Ald. 214; *Tighe v. Crafter*, 2 Taunt. 387: see *Steel v. Bradfield*, 4 Taunt. 227; *Macdonald v. Pasely*, 1 B. & P. 161.

(*r*) *Bonafous v. Rybot*, 3 Burr. 1374.

(*s*) *Gowlett v. Hanforth*, 2 W. Bl. 958.

(*t*) *Ante*, 725.

(*u*) 7 G. 2, c. 20, s. 1. See *Goodtitle d. Taysom v. Pope*, 7 T. R. 186; *Berthen v. Street*, 8 Id. 326; *Skinner v. Stacy*, 1 Wils. 80: and *ante*, 755, 775.

ment and costs(*x*). So, in debt on statute for a penalty (unless perhaps a *qui tam* action) the proceedings may be stayed upon payment of the penalty and costs(*y*); or if the action be for several penalties, the defendant may have the proceedings upon one or more of the counts stayed, upon paying into court the penalties claimed in such counts, and allowing the plaintiff to proceed upon the other counts if he wish it(*z*).

CHAP. X.

So, in covenant, where the breach assigned is the non-payment of money, proceedings may be stayed, upon payment of the amount claimed and costs. In Covenant.

On the other hand, in trespass and case, the court or judge will not, in general, stay the proceedings, upon payment of a sum of money and costs, not even in the action of trespass for mesne profits; because the damages in these cases cannot be ascertained without the intervention of a jury, and they will rarely, if ever, do so where there is any uncertainty as to the amount of value on damages(*a*): and, where a sheriff sold goods under a *fi. fa.* without paying the rent due to the landlord, the court refused to stay proceedings in an action by the landlord on payment of the sum for which the goods were sold into court, or to bind the plaintiff to pay costs in case of his not recovering more than the sum paid into court(*b*). Yet, in one case, under particular circumstances, the court ordered the proceedings to be stayed in an action of trespass, upon the defendant's restoring the goods seized, or paying the full value of them, with costs(*c*). (See further, *post*, 988, 989.) In Trespass or Case.

In trover, for money, the court or a judge will stay the proceedings, perhaps, upon payment of such sum with interest and costs, if there be no circumstances in the case calculated to enhance the damages beyond the mere interest. So, in trover for a specific chattel, when the chattel is of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, the court or a judge will allow such chattel to be brought into court, or will order it to be delivered to the plaintiff, and let him afterwards proceed in the action at his peril as to costs, in the same manner as upon payment of money into court(*d*): or perhaps they would grant a rule, calling upon the plaintiff to shew cause why, upon delivery to him of the goods in question, and upon payment of costs, all proceedings in the action should not be stayed(*e*). Where trover was brought for title-deeds, and a writ of inquiry executed, the court permitted satisfaction to be entered on the roll, upon In Trover.

(*x*) See *Simpson v. Stone*, 2 W. BL 785: *Thomas v. Edwards*, 2 Anst. 558.

(*y*) *Webb v. Punter*, 2 Str. 1217: *Stock v. Eagle*, 2 W. BL 1052: and see *Rex v. Strong*, 1 Burr. 431.

(*z*) *Tidd*, 9th ed. 541.

(*a*) See *Calvert v. Joliffe*, 2 B. & Ad. 418, *per Littledale, J.*: *Gibson v. Humphry*, 2 Dowl. 68: *Squire v. Archer*, 2 Str. 906: *Bowles v. Fuller*, 7 T. R. 335: *Holdfast v. Morris*, 2 Wils. 115: *Bernasconi v. Fairbrother*, 7 B. & Cres. 379.

(*b*) *Calvert v. Joliffe*, 2 B. & Ad. 418.

(*c*) *Pickering v. Truste*, 7 T. R. 53: and see *per Bayley, B.*, 2 Dowl. 69.

(*d*) *Rex v. Clarke*, 3 Burr. 1364; *Ca. Pr. C. B.* 59: *Pickering v. Truste*, 7 T. R. 53: see *Catling v. Bowling*, Say. 80: *Harding v. Wilkin*, Id. 120: *Bowington v. Parry*, 2 Str. 822: *Olivant v. Perineau*, Id. 1191: *Olivant v. Berino*, 1 Wils. 23: *Earl v. Holdernes*, 4 Bing. 462; 1 Moo. & P. 254, S. C.: *West v. Taunton*, 4 Moo. & P. 79; 6 Bing. 408, S. C.: *Lucas v. London Dock Company*, 4 B. & Ad. 378: and see form of rule there, Id. 380.

(*e*) *Ca. Pr.*, C. B. 130: *Tidd. Pract.*, 9th ed. 945: and see *Phillips v. Hayward*, 3 Dowl. 362.

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PART I.

the terms of the defendant's delivering up the deeds, &c., paying costs as between attorney and client, and putting the plaintiff in the same situation as before action brought, &c. (*g*). But where the goods have been sold by the defendant, and there is an uncertainty whether they were sold for the real value, the court or a judge will not, in general, interfere to stay the proceedings (*h*).

In Detinue. In detinue or trover for deeds, &c., the court or a judge will, on a delivery up of them, and payment of costs, either stay the proceedings, or, if the plaintiff insists on proceeding for damages, order that the plaintiff shall be subject to the costs of the action, unless he recover damages beyond nominal damages for the detention of the deeds, &c., in question (*i*). As to giving up *part* of the deeds, &c., in question, see *post*, p. 988.

In Replevin. In replevin of a distress for rent, the *plaintiff* may have leave to pay the rent claimed into court (*k*). Or he may have the proceedings stayed on payment of the rent, the single costs of the action, and of the application (*l*). And, upon application of the *defendant*, the court or a judge will stay the proceedings, upon payment of the costs of the action and the costs of replevying, and upon giving up the replevin-bond, if no special damage be stated in the declaration (*m*): or they will allow money to be paid into court under the 3 & 4 *W. 4*, c. 42, *ante*, 969.

In Ejectment. In ejectment for non-payment of rent, if the tenant or his assignee shall, at any time before trial, or at any time before execution after a judgment against the casual ejector, pay or tender to the landlord, or pay into court, all the arrears of rent and costs, all further proceedings shall cease (*n*). See also, as to staying proceedings in an ejectment by mortgagee, *ante*, 755, 775.

On one of several Counts. Where there are two or more counts in a declaration, and any one of them is for a demand of a sum certain, such as is above described, the defendant may obtain a stay of proceedings as to that count, upon payment of the sum of money therein demanded; and the plaintiff may proceed on the other counts if he wish it. Formerly, if the plaintiff did not proceed on the other counts, the defendant, by the terms of the rule or order, must have also paid him the costs of the action as far as it had proceeded; but this is now otherwise.

Rule or Order. In ordinary cases, *the proceedings may be stayed, upon ap-*

(*g*) *Coombe v. Sansom*, 1 D. & R. 201.

(*h*) *Gibson v. Humphrey*, 2 Dowl. 68; 1 C. & M. 544, S. C.

(*i*) *Phillips v. Hayward*, 3 Dowl. 362: see a form of a rule there.

(*k*) *Gregg's case*, 2 Salk. 597; *Vernon v. Wynne*, 1 H. Bl. 24; *Hopkins v. Shrole*, 1 B. & P. 382; and see *ante*, 806. On June 28, 1837, in *Gayler v. Cleeve, Colman, J.*, at chambers, after considering the point, made an order for the payment by the plaintiff, into court, of *part* of the rent claimed, and the following is a copy of the order:—"Upon hearing the attorneys or agents on both sides, I do order that the plaintiff's application to stay proceedings, upon payment of the sum of 75*l*. for the three quarters' rent of the premises for Christmas last, mentioned in the avowry in this action, and 2*l*. for other

arrears, into court, together with costs to the present time, to be taxed, be discharged, the defendants declining to accept those sums as the amount of the rents due. And I further order that the plaintiff do pay the said two sums of 75*l*. and 2*l*. into court; and that in case, upon the trial, no more rent shall be found due than the said two sums, or the defendants shall afterwards accept those sums, they shall not be entitled to more costs than they are at present entitled to, but that they shall pay all costs incurred by the plaintiff subsequent to this day."

(*l*) *Hopkins v. Shrole*, 1 B. & P. 382.

(*m*) *Banks v. Brand*, 3 M. & Sel. 525; *ante*, 806.

(*n*) 4 G. 2, c. 28, s. 4: see more fully *ante*, 755, 775.

plication to a judge at chambers (o); or by application to the court in term time, in which case the rule is absolute in the first instance; in other cases you must apply for a rule to shew cause. As soon as you have obtained the rule absolute or order, get an appointment on it from one of the masters, and serve a copy of the rule or order with the appointment on the plaintiff's attorney or agent; then get the costs taxed, and pay them without delay (p). Where the rule in a bailable case before the 1 & 2 V. c. 110, was, that, in default of payment of debt and costs forthwith, the plaintiff should be at liberty to sign final judgment, it was held, that the order only meant that the plaintiff was to be at liberty to sign final judgment on a common appearance being entered; but that it did not entitle him to special bail (q). If the rule or order be, that upon payment of debt and costs within a certain time the proceedings be stayed, and the debt and (r) costs be not paid within the time so limited, the plaintiff should proceed in the action; the rule being conditional, he cannot obtain an attachment (s). But sometimes the order is drawn up so as to make it absolutely binding on the defendant to pay the costs, in which case the plaintiff may proceed by attachment or execution for the recovery of them (t); and, in some cases, may sign judgment if the order warrant it (u). If the sum paid be under 20*l.*, the costs will be taxed on the reduced scale, unless the order provide otherwise (x).

for, how obtained, and Effect of.

It may be observed, that an attorney, who stays proceedings on an undertaking to pay the costs, is bound to pay them, though his client die before bail is put in (y). And the court will sometimes enforce by attachment an undertaking of a defendant, though not an attorney or officer of the court, to pay the costs, &c., in consideration of plaintiff's staying the proceedings (z).

Undertaking to pay, on staying Proceedings, enforced.

Where the Amount is disputed.] It may be premised that the court will not, in general, interfere to stay proceedings merely on affidavit that there is no debt due, or no cause of action (a). And in general, where the defendant disputes the amount of the sum claimed, and the nature of the claim is such that he may pay money into court on it, (as to which see ante, 971, 972), he should pay the sum actually due into court accordingly, and defend for the rest of the claim; or, if he cannot pay it, or the nature of the claim be such that he cannot pay money into court on it, then his course is either to plead to that part of the claim which he disputes, and, as to the residue, to allow judgment to pass against him by default, and have the damages ascertained by an inquest,

Where the Amount is disputed.

(o) See form of order, Chit. Forms, 583.

(p) See *Partington v. Williams*, 2 N. R. 398.

(q) *Isaac v. Ricardo*, 7 Dowl. 94.

(r) See *Smith v. Smith*, 2 N. R. 473.

(s) *Fricker v. Eastman*, 11 East, 319; *Hand v. Lady Dinely*, 2 Stra. 1226: and see *Turner v. Gill*, 3 Dowl. 30; *Sisney v. Nevinnson*, Str. 699; 1 Camp. 559, n.: *Toms v. Powell*, 7 East, 536; *Fawcett v. Christie*, 2 B. & P. 515; *Smith v. Smith*, 2 N. R. 473; *Dodsley v. Lady Hamilton*, 5 Taunt. 1.

(t) *Fricker v. Eastman*, 11 East, 21; *Scurrall v. Horton*, Barnes, 283.

(u) See form of the judgment, Chit. Forms, 583.

(x) *Cook v. Hunt*, 7 Dowl. 397; 5 M. & W. 161, S. C.

(y) *Hellings v. Jones*, 10 Moore, 360; 3 Bing. 70, S. C.

(z) See *Tardrew v. Brook*, 5 B. & Ad. 380; *Riley v. Byrne*, 2 B. & Ad. 779.

(a) *Smith v. Curtis*, 2 Dowl. 223; *Sherwood v. Benson*, 4 Taunt. 631: but see *Turner v. Taylor*, Tidd, 530; *post*, 997.

BOOK IV.
PART I.Order to pay
in Part, and
Plaintiff to
proceed at
Peril of Costs.In Actions for
a Money De-
mand.

or, in some cases, as on bills of exchange, &c. (*b*), by a reference to the master (*c*).

But even in cases where the amount of the sum claimed is *disputed*, and the defendant is willing and able to pay it, it is not unusual for the defendant to obtain a summons, calling upon the plaintiff to shew cause why, upon payment of a certain sum, (namely, the sum actually due, or which you think he can recover), and costs, the proceedings in the action should not be stayed. If, on attending before the judge, the plaintiff's attorney refuse to receive the amount mentioned in the summons, pay it into court; and if he afterwards take it out, and serve you with an appointment to tax the costs, move the court upon an affidavit of the facts, for a rule to shew cause, or apply to a judge on a summons to shew cause, why one of the masters should not tax the defendant's costs from the time of the service of the original summons, and the plaintiff's costs up to that time only; and why, after deducting the defendant's from the plaintiff's costs, upon payment of the balance due to the plaintiff, all further proceedings in the action should not be stayed; which will be ordered accordingly (*d*). Or, if the defendant's costs exceed the plaintiff's, then that the proceedings in the action be stayed, and that the plaintiff shall pay to the defendant, or his attorney, the balance, after deducting the amount of the plaintiff's from the defendant's costs. The ground on which the judge proceeds in these cases is this: if the defendant is once ready to pay a given sum and the plaintiff refuses to receive it, if the defendant subsequently pays in the money (*e*) and the plaintiff takes it out, it is *prima facie* evidence of oppressive conduct on the part of the plaintiff: and unless some explanation be given by him, the judge will order the defendant to be exempted from intermediate costs, and make the plaintiff pay them (*f*). But the presumption of oppressive conduct may be rebutted (*f*); thus, where in an action for a wrongful dismissal, and also for arrears of salary, a summons was taken out to stay proceedings on payment of arrears of salary only, and, on the plaintiff's refusal, the arrears were paid into court, and afterwards accepted by the plaintiff in full satisfaction, on a motion to tax the defendant his costs, *Parke, B.*, held that, the circumstance of the plaintiff's having obtained a more profitable employment after the payment into court, was sufficient to rebut the presumption of a vexatious refusal; and that the defendant was not entitled to his costs (*g*). If the plaintiff proceed and declare, the defendant should still pay the money offered into court, and plead such payment as usual (*h*). In one such case the court refused to order the defendant's costs to be taxed to him, because the case had not previously been brought before the master (*i*).

In Detinue or
Trove.

Also, in detinue, or trover for deeds, &c., where the de-

(b) See *ante*, 721.

(c) See the last Chapter.

(d) See *ante*, 975: and see *Saunderson v. Piper*, 7 Dowl. 632, as to the insufficiency of mere readiness to pay a certain sum, without taking out such a summons.(e) But not otherwise. (*Gower v. Elkins*,

6 Dowl. 335).

(f) *Per Parke, B.*, in *Gower v. Elkins*, 6 Dowl. 335.(g) *Cumming v. Columbine*, 6 Dowl. 373.(h) *Gower v. Elkins*, 6 Dowl. 335.(i) *Roe v. Cobham*, 6 Dowl. 628.

defendant admits the plaintiff's right to part of the deeds, &c., in dispute, but disputes it as to the rest, the defendant may, on delivering up the deed, &c., which he admits to be the plaintiff's, and payment of costs, obtain a stay of proceedings; or if plaintiff still insists on proceeding for damages, or for the other deeds, &c., then he may obtain a rule or order, that the plaintiff shall be subject to the costs of the action, unless he obtain a verdict for some of the other deeds, &c., or damages beyond nominal damages for the detention of the deed in question (*j*).

Also, in replevin, where the amount of the rent due is in dispute, the plaintiff may obtain an order for staying proceedings on payment of the sum admitted to be due and costs, or, if the defendant refuses, then an order for payment into court of the sum which plaintiff admits to be due; and that in case defendant shall not recover a greater sum, or shall accept the sum paid in in satisfaction, he shall pay all costs incurred by the plaintiff subsequent to the date of the order (*k*).

In Replevin.

In other actions *ex delicto* for unliquidated damages, the amount of which is disputed, the courts have not been in the habit of interfering to stay proceedings (*l*); but in some such cases the defendant may take out a summons to stay the proceedings, on payment of a certain sum, and put the plaintiff at the peril of costs of further proceedings in the action, as mentioned *ante*, 988, or may obtain a judge's order to pay, and pay money into court, as noticed *ante*, 969, &c.

In other Actions for unliquidated Damages.

Upon Payment of Debt, &c., without Costs.] If the plaintiff or his attorney has been guilty of gross misconduct, the court will sometimes stay the proceedings on payment of the debt without costs (*m*). Where a sheriff levied under a *fi. fa.*, and the plaintiff brought an action for money had and received against him, for the amount of the money levied, without having previously made a demand of it, the court, upon application, stayed the proceedings in the action, upon payment of the money levied, without costs (*n*). If no demand be made for payment of an acceptor of a bill before action brought, the court or a judge, on an early application, might stay the proceedings on payment of the debt without costs (*o*). Where the defendant, after an application by the plaintiff's attorney, paid the plaintiff the debt demanded, without notice that a writ had been sued out, about which the plaintiff said nothing, and the attorney afterwards arrested the defendant for the costs on a writ which had been sued out before the payment of the debt, the Court of Common Pleas ordered the proceedings to be stayed without costs (*p*). And where, after defendant had paid the debt, the plaintiff's attorney proceeded for costs, and obtained a verdict for nominal damages and judgment, and issued execution, the attorney being uncertificated, and therefore not entitled to costs, the court stayed the execu-

Upon Payment of Debt, &c., without Costs.

(*j*) *Phillips v. Hayward*, 3 Dowl. 362; 696.

where see the form of order.

(*k*) *Gayler v. Cleeve*, *ante*, 986, n. (*k*).

(*l*) *Ante*, 985, n. (*a*).

(*m*) *Adams v. Staton*, 1 Bing. 769; 7 Moore, 365, S. C.; *ante*, 976.

(*n*) *Jefferies v. Sheppard*, 3 B. & Ald.

(*o*) *Mackintosh v. Haydon*, R. & M. 363, per Abbott, C. J.; but see *Siggers v. Lewis*, 2 Dowl. 681.

(*p*) *Rooke v. Wasp*, 5 Bing. 190; 2 Moo. & P. 304, S. C.; and see *Wylie v. Phillips*, 3 Bing. N. C. 776.

BOOK IV.
PART I.

tion(*g*). But where the defendant having, on application by letter from the plaintiff's attorney, promised to remit the amount to him, and induced the attorney to suppose he would pay his charge for the letter, afterwards, and before writ issued, remitted the debt to the plaintiff without the costs, and the attorney, not knowing of the payment, to secure his costs, issued out the writ, and the money did not arrive to the plaintiff until after the writ issued, the court refused to stay the proceedings unless defendant paid the costs of the writ, and 6s. 8d. for the instructions, together with the costs of the application(*r*).

Where inferior
Courts have
Jurisdiction.

We shall presently see that, in actions for debts recoverable in courts of requests, where, after verdict, the plaintiff might be deprived of costs, the proceedings will in clear cases be stayed on payment of debt without costs(*s*). Also, that in cases beneath the dignity of the court the proceedings may be stayed without payment of either debt or costs(*t*).

On equitable
Grounds.

On equitable Grounds.] The court will not, in general, alter the terms ordinarily imposed on a party applying to stay proceedings, merely because he has a defence in equity. Thus they have refused to stay proceedings on payment into court of part of the amount of a note sued on, though it appeared that the rest of the money, when recovered would be held by the plaintiff in trust for the defendant(*u*). So, where the payee of a promissory note indorsed upon it, that if interest were paid on stipulated days during her life, the note was to be given up, a payment of interest having been omitted, and an action brought on the note, the court refused to stay proceedings on payment of the interest and costs(*v*). Where, however, the plaintiff sued as trustee under suspicious circumstances, the court stayed proceedings on payment of costs to the plaintiff, and payment of the debt into court instead of to the plaintiff(*w*). And, although the court will not stay proceedings for the purpose of allowing the defendant to file a bill in equity for relief(*x*); yet they have granted time to plead for the purpose of enabling him to file a bill for *discovery* (*y*). And on payment of the money recovered into court, and of the attorney's costs, they have stayed execution in an action by assignees of a bankrupt under a first commission, pending a petition to the chancellor to supersede it(*z*).

In second
Actions for
the same
Cause.

In Ejectment.

In second Actions for the same Cause.] Upon the application of a defendant in *ejectment*, the court or a judge will stay the proceedings until the costs of a former action be paid(*a*), although the first action were not between the present parties, but by the father of the present lessor of plaintiff against the present defendant's father(*b*); or by an insolvent, the present ejectment being by his assignees(*c*); and even although the

(*g*) *Meekin v. Whalley*, 2 Dowl. 823; 1 Bing. N. C. 59, S. C.

(*r*) *Morrison v. Summers*, 1 B. & Ad. 559; 1 Dowl. 325, S. C.

(*s*) *Post*, 994.

(*t*) *Ibid*.

(*u*) *Barlow v. Leeds*, 5 Nev. & M. 426.

(*v*) *Steele v. Bradfield*, 4 Taunt. 227.

(*w*) *Jones v. Bramwell*, 3 Dowl. 483.

(*x*) *R. v. Peto*, 1 Y. & J. 169; *Murphy v. Cadell*, 2 B. & P. 137.

(*y*) *Whitter v. Cazalet*, 2 T. R. 683.

(*z*) *Hodgkinson v. Travers*, 2 D. & R. 409; 1 B. & C. 257, S. C.

(*a*) *Doe Pinchard v. Roe*, 4 East, 585; *Lord Coningsby's case*, 1 Str. 548; *Grumble v. Bodilly*, Id. 554; 8 Mod. 225, S. C.; see *Benn v. Denn*, Barnes, 180.

(*b*) *Doe Feldon v. Roe*, 8 T. R. 645; and see *Doe Pinchard v. Roe*, 4 East, 585; *Doe Chambers v. Law*, 2 W. Bl. 1180; *Doe Hamilton v. Hatherly*, 2 Stra. 1152.

(*c*) *Doe Standish v. Roe*, 5 B. & Ad. 873.

present action be not for the same lands, provided it be upon the same title(*d*). And it is not material, in this respect, in which court the former action was(*e*), or whether there was any plea or consent rule in the former ejectment, or whether the lessor in the former ejectment ever entered into the consent rule(*f*). And where a defendant in ejectment who had improperly obtained a tenant right to property sought to be recovered, was held estopped from disputing the lessor's title, and he afterwards brought another ejectment in respect of property part of the same estate, he was compelled to pay the costs of the action in which he had been defendant before proceeding(*g*). But if the lessor of the plaintiff, upon discovering a material mistake before trial, abandon that ejectment and bring another(*h*), or abandon his suit in one court and bring a new action in another(*i*), the court or a judge will not stay proceedings until the costs of the former action be paid, particularly if the proceedings do not appear to be vexatious. Nor would they stay proceedings if the first action were brought without the authority of the plaintiff, so that he could have no control over it(*j*). So, if the plaintiff were nonsuit, &c., in the first action, by the fraud or perjury of the other party, the court or a judge will not stay the proceedings in the second action(*k*). Also, where a defendant in a former ejectment, after being evicted, brings another ejectment for the same premises, the court or a judge will stay the proceedings until he pay the costs of the former action(*l*), in whatever court such action was(*m*). Besides the costs of the former ejectment, the court or a judge will in some cases also oblige the party to pay the costs of the action for mesne profits(*n*); but in no case will they oblige him to pay the damages in such action, however vexatious the proceedings of the present lessors of plaintiff may have been(*o*). Besides the cases above mentioned, the court have stayed the proceedings in a second ejectment until the special verdict in the former one should be determined(*p*). So, where the defendant, after verdict against him, brought a writ of error, and pending the writ brought a new ejectment to recover the same premises, the court stayed proceedings in the new action until he quitted possession, or the tenants attorned to the lessor of plaintiff in the former action(*q*). But the court have refused to stay proceedings in an ejectment, until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, were paid(*r*). And the Court of Common Pleas have refused to stay the proceedings in a writ of right, until the costs of a prior ejectment for the same property were paid(*s*). And

(*d*) *Keene Angel v. Angel*, 6 T. R. 740.

(*e*) *Lord Coningsby's case*, 1 Stra. 548: *Grumble v. Bodilly*, Id. 554; 8 Mod. 225, S. C.: *Doe Chadwick v. Law*, 2 W. Bl. 1158: *Anon.*, 1 Salk. 255: *Doe v. Brenton*, 6 Bing. 469.

(*f*) *Smith d. Ginger v. Barnardiston*, 2 W. Bl. 904: *Doe Langdon v. Langdon*, 5 B. & Ad. 864.

(*g*) *Doe Thomas v. Shadwell*, 7 Dowl. 527.

(*h*) *Short v. King*, 2 Str. 681, 1099: *Brittain v. Greenville*, Id. 1121.

(*i*) *Doe Selby v. Alston*, 1 T. R. 491.

(*j*) See *Souter v. Watts*, 2 Dowl. 263.

(*k*) *Doe Rees v. Thomas*, 4 D. & R. 145; 2 B. & C. 622, S. C.

(*l*) *Thrustout Williams v. Holdfast*, 6

T. R. 223.

(*m*) *Doe Walker v. Stevenson*, 3 B. & P. 22.

(*n*) *Doe Pinchard v. Roe*, 4 East, 585: *Doe Green v. Packer*, 2 Dowl. 373, S. C.

(*o*) *Doe Church v. Barclay*, 15 East, 233.

(*p*) *Smith d. Dormer v. Parkhurst*, 2 Str. 1105.

(*q*) *Fenwick v. Grosvenor*, 1 Salk. 258.

(*r*) *Doe Williams v. Winch*, 3 B. & Ald. 602: and see *Murphy v. Cadell*, 2 B. & P. 137: *Bowyear v. Bowyear*, 2 Dowl. 207.

(*s*) *Chatfield v. Souter*, 3 Bing. 167; 10 Moore, 572, S. C.: *Bowyear v. Bowyear*, 3 Moo. & Scott, 65; 9 Bing. 570; 2 Dowl. 207, S. C.

BOOK IV.
PART I.In other Ac-
tions.

where an unsuccessful defendant in an action of ejectment brought an action against the lessors of the plaintiff for seizing goods on the land in question, the court refused to stay proceedings until the costs of the ejectment were paid (*t*).

And not only in ejectment, but also in other actions, if the second action appear to have been brought *vexatiously*, the court or a judge will stay proceedings until the costs of the former action be paid (*u*), provided both actions were by and against the same parties, and for the same cause (*x*). Also, if several actions be brought and are pleading for the same cause, the court will stay the proceedings in all but one (*y*). Also, where an action was stayed in the King's Bench by a consolidation rule, and the plaintiff thereupon discontinued it, and commenced another action in the Common Pleas for the same cause, that court stayed the proceedings until after the trial of the cause in this court with which the former action had been consolidated (*z*). Also, in another case, where the plaintiff brought an action in the Exchequer, against the hundred, pursuant to the 7 & 8 G. 4, c. 31, which requires such action to be brought within three months, and afterwards commenced another action in the King's Bench for the same cause, the latter court ordered the proceedings in the second action to be stayed, unless plaintiff would discontinue the action in the Exchequer, the plaintiff not having declared in either action; but the court would not grant the costs of the application (*a*). And an action by husband and wife has been stayed until the costs of a former action by the husband for the same cause were paid (*b*). But a stay of proceedings has been refused in a second action for a debt where the first was not decided on the merits (*c*). And the same where the first action was *nonprossed* (*d*). And the same where the proceedings in the first action were set aside for irregularity (*e*). And the same where the plaintiff was in execution for the costs of the first action (*f*). And the court will not stay the proceedings on the ground of the pendency of another action for the same cause against the defendant jointly with another person, except in the case of oppression or vexation; though, if such a case be made out, they will interfere in a summary way, or even, it seems, allow the party to plead in abatement, notwithstanding the four days have expired (*g*). The court have refused to stay proceedings against a defendant until the debt and costs recovered by him in a former action against the present plaintiff should be paid (*h*). And, in an action for penalties, the court will not stay the proceedings, upon an

(*t*) *Carnaby v. Welby*, 7 Dowl. 315.

(*u*) *Baldwin v. Richards*, 2 T. R. 511, n.: *Melchart v. Halsey*, 2 W. Bl. 741; 3 Wils. 149, S. C.: *Crawley v. Impey*, 8 Taunt. 407; 2 Moore, 460, S. C.: *Weston v. Withers*, 2 T. R. 571: see *Winter v. Slow*, 2 Str. 878: but see *Pashley v. Poole*, 3 D. & R. 53.

(*x*) *English v. Cox*, Cowp. 322: see *Dicas v. Jay*, 6 Bing. 519.

(*y*) *Nichols v. Lefevre*, 3 Dowl. 135: *ante*, 966: or defendant might plead the pendency of the first in abatement. If there was a writ in being at the time of suing out the second writ, it is plain that the second is vexatious and ill *ab initio*; Bac. Abr., Abatement (M). As to arrest-

ing a defendant in a second action, before discontinuing a prior one, see *ante*, Vol. I. 476, 478.

(*z*) *Parkin v. Scott*, 1 Taunt. 565.

(*a*) *Miles v. Inhabitants of Bristol*, 3 B. & Ad. 945.

(*b*) *Lamplsey v. Sands*, 1 T. R. 584.

(*c*) *Pashley v. Poole*, 3 D. & R. 53.

(*d*) *Liversedge v. Goode*, 2 Dowl. 141.

(*e*) *Dawson v. Sampson*, 2 Chit. 146, *semb.*

(*f*) *Beaven v. Robins*, 8 D. & R. 42.

(*g*) *Sowler v. Dunstan*, 1 M. & R. 508: *ante*, 653, 654.

(*h*) *Cooke v. Dobree*, 1 H. Bl. 10: see *Smith v. Roll*, 2 Dowl. 62.

affidavit that the defendant had been sued by another person, and compounded for the same offence; at least, not unless the affidavit shew, specifically, what was the offence compounded for, that the court may see that both offences are the same(*i*).

The court have also, in some few instances, under peculiar circumstances, and where the proceedings were evidently vexatious, stayed the proceedings in a second action, after a recovery for the same cause in a former one. But this is very rare; and the court usually refuse to interfere in this summary way, but put the defendant to plead the former recovery(*j*).

After Recovery in former Action.

The Court of Common Pleas refused to stay proceedings on the ground that a former action for the same cause had been referred by rule of court to an arbitrator, by which the plaintiff was precluded from bringing a new action, the identity of the two actions being doubtful(*k*). And the same where it was doubtful whether the award was made before revocation or not(*l*). But where a new action was brought in breach of an undertaking not to do so, on consenting to the withdrawal of a juror at the suggestion of the judge, the court stayed the proceedings(*m*).

After Reference or Withdrawal of Juror, in former Action.

Where a person, however, who has a right of action against several for one specific damage, recovers and receives a satisfaction from any one of them, the court, for the same cause, will stay proceedings in any action he may bring against the others(*n*). And, in a case where separate actions were brought against several persons for the same debt, who (if at all) were *jointly* liable, the defendant in one action having paid the debt and costs in that action, the court stayed the proceedings in the others without costs(*o*).

In Actions against several Defendants.

When the proceedings in a second action are stayed until payment of the costs of the former action, if such costs be not paid, the court will not interfere, but will allow the defendant (in case those costs are not paid before a certain day) to *non-pros* the second action(*p*); but if the plaintiff in such a case take any proceedings in the second action, before the costs of the first are paid, the court, upon application, will set them aside with costs.

Effect of Stay till Payment of Costs of former Action.

The application to stay the proceedings on any of these grounds should be made as soon as possible, and before the plaintiff has incurred further expenses. It cannot be made in ejectment before the defendant has entered into the consent rule(*q*). In one case of an ejectment it was granted after notice of trial in the second action of ejectment had been given, and the plaintiff had been at the expense of preparing for trial, and bringing the witnesses to town(*r*). And in a late case, where the declaration in ejectment was served on

Application, when to be made.

(i) *Harrington v. Johnson*, Cowp. 744: see *Pechell v. Layton*, 2 T. R. 512, 712: *English v. Cox*, Cowp. 322.

(j) *Harrington v. Johnson*, Cowp. 744: *Pechell v. Layton*, 2 T. R. 512; and see *Id.* 712: *Liversedge v. Goode*, 2 Dowl. 141; where the plaintiff in replevin, after being *nonprossed*, brought an action of trespass, and the court refused to interfere. But had the plaintiff recovered in replevin, the court might have stayed proceedings in an action of trespass for the same cause. (*Lamb v. Nutt*, 1 Tidd. 572).

(k) *Dicas v. Jay*, 6 Bing. 619; 2 Moo. &

P. 448, S. C.

(l) *Louis v. Kermode*, 8 Taunt. 146; 2 Moore, 30, S. C.

(m) *Moscatti v. Lawson*, 1 H. & W. 572.

(n) *Semb. Bird v. Randall*, 3 Burr. 1354; 1 W. Bl. 389, S. C.

(o) *Carne v. Legh*, 6 B. & C. 124; 9 D. & R. 126, S. C.

(p) *Sutton d. Doe v. Ridgway*, 5 B. & Ald. 523.

(q) *Doe Crockett v. Roe*, 1 H. & W. 351: but see Adams on Ejectment, 2nd ed. 320.

(r) *Doe Chadwick v. Law*, 2 W. Bl. 1158.

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the 30th September, to appear in Michaelmas term, and the issue was delivered, and notice of trial given for the assizes on the 28th December, and the application by summons was not made until the 6th January, the court held it not too late, saying that the plaintiff need not have joined issue so soon for the Spring assizes(*s*).

In trifling
Actions.

In trifling Actions.] It is deemed beneath the dignity of the superior courts at Westminster to take consuance of pleas under 40*s.*; and in trespass for goods, it is expressly prohibited by stat. 6 *Ed.* 1, *c.* 8. Therefore, if it appear either upon the face of the declaration(*t*), or by the plaintiff's acknowledgment(*u*), or even from the defendant's affidavit, if not denied by the plaintiff(*x*), that the sum for which the action is brought is really less than 40*s.*, the court or a judge will stay the proceedings, unless it appear that the debt is not recoverable in any county court, court of requests, or other inferior court(*y*). The plaintiff cannot evade this by suing for a larger colourable cause of action(*z*). But the court would not stay the proceedings in an action of trover, on an affidavit from the defendant that the cause of action did not amount to 40*s.*; the amount of the value of the article sought to be recovered by such action, being mere matter of calculation to be ascertained by a jury(*a*); and the defendant might now pay the value into court.

Where reco-
verable in
Court of Re-
quests, &c.

In an action for a debt of any amount recoverable in a court of requests, where the plaintiff might, after verdict, be deprived of the costs, the court or a judge will, if the case be clear, stay the proceedings on payment of the debt without costs(*b*).

Application,
when made,
&c.

The application should be made as soon as possible, and before the plaintiff has incurred any further expense. It might, however, it seems, be made any time before trial(*c*). But if the suit be for a cause of action within the consuance of the court of requests of the district or place where the parties reside, and if there be a prohibitory clause in the statute, by which the jurisdiction of the inferior court is created, (as in the Tower Hamlets' Act), the application should be made before plea pleaded; in other cases, usually before issue joined(*d*). The rule, if obtained in court, is a rule *nisi*, unless perhaps where the cause of action appears from the pleadings to be under 40*s.*(*e*).

In Actions
pending Er-
ror, &c.

In Actions pending Error, &c.] It is entirely in the discretion of the court to stay proceedings pending a writ of error. Where judgment was obtained in the Court of Exchequer in an action on a foreign judgment, the court refused to prevent the plaintiff from charging the defendant in execution, though it was sworn that an appeal was pending in the foreign court; and *Parke, B.*, said, that it would be time

(*s*) *Doe Green v. Packer*, 2 Dowl. 373, S. C.

(*t*) *Oulton v. Perry*, 3 Burr. 1592.

(*u*) *Kennard v. Jones*, 4 T. R. 495: and see *Melton v. Garment*, 2 New Rep. 84: *Stean v. Holmes*, 2 W. Bl. 754: *Sandall v. Bennett*, 3 Dowl. 294.

(*x*) *Wellington v. Arters*, 5 T. R. 64: but see *Oulton v. Perry*, 3 Burr. 1592: *Anon.*, 2 Ld. Raym. 1304: *Welsh v. Troyte*, 2 H. Bl. 29: *Tubb v. Woodward*, 6 T. R. 175:

Lowe v. Lowe, 1 Bing. 270.

(*y*) *Eames v. Williams*, 1 D. & R. 359: *Welsh v. Troyte*, 2 H. Bl. 29.

(*z*) *Thompson v. Gill*, 6 Dowl. 155.

(*a*) *Lowe v. Lowe*, 8 Moore, 220; 1 Bing. 270, S. C.

(*b*) *Cornforth v. Lowcock*, 1 M. & R. 321: see *Sandall v. Bennett*, 3 Dowl. 294.

(*c*) See *Kennard v. Jones*, 4 T. R. 495.

(*d*) MS., M. 1814: *vide post*, Ch. 32.

(*e*) See *Kennard v. Jones*, 4 T. R. 495.

enough to apply when the judgment of the foreign court was reversed (*f*). As to staying proceedings in an action upon a judgment pending error, see *Vol. I.* 360. As to staying execution upon the original judgment, pending error, see also *Vol. I.* 359, 360. And as to staying proceedings against bail upon their recognisance, pending error, in the action against the principal, see *Vol. I.* 641, 642, 619.

Pending a Rule Nisi, &c.] As to this, see *post*, 1045. As to staying proceedings pending an order for particulars, see *post*, 1033. It may be here observed, that a motion for a rule which would operate as a stay of proceedings, cannot be made on the last day of the term, unless it appear to the court, under the circumstances, that it could not have been made earlier (*g*).

Staying Proceedings pending rule Nisi, &c.

Where there are adverse Claims, &c.] As to this, see the next Chapter. Where a separate commission was sued out against A., and a joint commission was afterwards sued out against him and B., and the assignees under the first commission obtained a verdict in an action against C., the court, at the instance of the defendant, ordered proceedings to be stayed on payment of the amount into court, to abide the event of a petition to the chancellor to supersede the first commission (*h*).

Where there are adverse Claims, &c.

Pending criminal Proceedings.] The court will not compel a plaintiff to elect between an action and an indictment for the same cause (*i*). In an action commenced by bailable process, the court refused to stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt (*j*). In an action for money won at play, the court refused to stay the proceedings until after the trial of an indictment against the parties for a cheat (*k*). So, after verdict and judgment, the court refused to stay proceedings until after the trial of an indictment for perjury then pending against the plaintiff's witnesses (*l*). But, where the plaintiff, who was indicted for felony, brought an action to recover money he had deposited with a banker, and which was surmised to be the produce of the felony, the Court of Common Pleas stayed the proceedings in the action until after the trial of the indictment (*m*).

Pending criminal Proceedings.

In Actions brought without Authority.] If an attorney bring an action without the plaintiff's authority, the court will sometimes stay (*n*) or set aside the proceedings (*o*). But the court refused to compel to be refunded to a defendant monies

In Actions brought without Authority.

(*f*) *Alison v. Furnival*, 3 Dowl. 202; 1 C., M. & R. 277, S. C.

(*g*) *Leader v. Harris*, Tidd's Pract. 518.

(*h*) *Hodgkinson v. Travers*, 2 D. & R. 409; 1 B. & C. 257, S. C. See in case of outlawry, *Grant v. Bryant*, 6 M. & Sel. 347.

(*i*) *Jones v. Clay*, 1 B. & P. 191.

(*j*) *Johnson v. Wardle*, 3 Dowl. 550: and see *Rex v. Boston*, 4 East, 572.

(*k*) *Anon.*, 2 Salk. 649.

(*l*) *Warwick v. Bruce*, 4 M. & Sel. 140; see also *Lofft*, 436: *Rex v. Tremearne*, 5 B. & C. 761; 8 D. & R. 590, S. C.

(*m*) *Deakin v. Praed*, 4 Taunt. 825.

(*n*) *Doe Baker v. Roe*, 3 Dowl. 496: *Robson v. Eaton*, 1 T. R. 62: *Doe Davis v. Eytton*, 3 B. & Ad. 785: *Sowler v. Watts*, 2 Dowl. 263; and see *Newton v. Matthews*, 4 Dowl. 237: *sed vide Mudry v. Newman*, 1 C., M. & R. 402; 2 Dowl. 695, S. C. As to the consequences of an attorney defending an action without authority, see *ante*, Vol. I. p. 56.

(*o*) See *Robson v. Robson*, 1 T. R. 62: *Buckle v. Roach*, 1 Chit. Rep. 194; but see Vol. I. 56, 57.

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arising from an execution on his goods, though the action had been defended without his authority, and he knew nothing of it till execution issued, as it did not appear that the attorney was insolvent (*p*).

By Wife.

And where an attorney brought an action for a wife, in her husband's name, (the wife living apart from her husband), without authority from the latter, the court refused to stay the proceedings, although the husband joined the defendants in the application (*q*); though, in a later case, the court ordered the proceedings to be stayed, until an indemnity was given to the husband (*r*). The wife of a lunatic, who has no committee, has a sufficient implied authority to sue in the name of the lunatic for debts due to him (*s*).

By Cestui
que Trust.

And in other cases, as, where a *cestui que trust* brings an action in the name of his trustee; or in the case of joint-tenants or joint-contractors, or joint-contractors and the assignees of bankrupt &c.; joint-contractors (*t*), where one is obliged to use the other's name in a suit; the court will not stay proceedings upon the application even of the trustee, &c., excepting perhaps temporarily, until such trustee, &c., be indemnified against the costs of a nonsuit, or verdict against him (*u*). In these cases, a demand of indemnity ought to be made before applying to the court; otherwise, at least, the court will not give costs of the application (*v*).

By Assignee
of Debt.

An assignee of a debt has a right to use the assignor's name in suing for it; and it is a sufficient authority for the attorney if he be instructed by the former to commence proceedings (*x*). But the court would, probably, compel him to indemnify the assignor, by staying proceedings until such indemnity was given.

By Lunatic,
&c.

Where a plaintiff had been delirious, and on apparently recovering he brought an action against his bankers to recover money belonging to him in their hands, the court would not oblige him to give an indemnity to the bankers on payment by them to him of the sum for which the action was brought (*y*). We have seen, that the wife of a lunatic may sue in his name (*supra*).

Where one
Plaintiff dis-
sents.

Where one of several plaintiffs dissented from bringing an action of replevin, the court refused to interpose by striking out his name unless upon a suggestion of fraud (*z*).

Where the
Attorney is
uncertificated
&c.

Where the Attorney is Uncertificated, &c.] If the action be brought in the name of an attorney not duly enrolled or certificated, the court or a judge will stay the proceedings until a proper attorney be appointed (*ante*, 35).

(*p*) *Stanhope v. Eavery* (or *Firmin*), 5 Dowl. 357; 3 Bing. N. C. 301, S. C.

(*q*) *Chambers v. Donaldson*, 9 East, 471; and see — *v. Smith*, 2 Chit. Rep. 392.

(*r*) *Morgan & Wife v. Thomas*, 2 Dowl. 332; 2 C. & M. 388, S. C.; *Harrison v. Almond*, 4 Dowl. 321; 1 H. & W. 519, S. C.

(*s*) *Rock v. Slade*, 7 Dowl. 22.

(*t*) *Whitehead v. Hughes*, 2 Dowl. 258; 2 C. & M. 318, S. C.

(*u*) See *Spicer v. Todd*, 1 Dowl. 306; 2 C. & J. 165; 2 Tyr. 172, S. C.; *Whitehead v. Hughes*, 2 Dowl. 258; 2 C. &

M. 318, S. C.; *Emery v. Mucklow*, 10 Bing. 23; 3 M. & Scott, 384; 2 Dowl. 735, S. C.; *Savile v. Roberts*, 1 Ld. Raym. 380; *ante*, 755. In case of dispute, the sufficiency of the indemnity would be referred to one of the masters.

(*v*) See as to the demand requisite, where defendant applies for security, *Huntley v. Bulmer*, 6 Dowl. 633.

(*x*) *Pickford v. Ewington*, 4 Dowl. 453.

(*y*) *Williams v. Smith*, 1 Dowl. 632.

(*z*) *Emery v. Mucklow*, 10 Bing. 23; 3 M. & Scott, 384; 2 Dowl. 735, S. C.

In Penal Actions by Common Informers.] In all suits by a common informer, within stat. 21 J. 1, c. 4 (a), commenced in the superior courts, the proceedings will be stayed upon application (b). So, if an action on a penal statute be brought when the proper mode of proceeding is by information and conviction before a justice of peace, the court will stay the proceedings. Actions for penalties on the Lottery Acts must be brought in the Court of Exchequer, in the name of the Attorney-General (c); if commenced in one of the superior courts, the proceedings will be stayed. And the same as to actions for penalties on the Stamp Acts (d). And see the 7 & 8 G. 4, s. 53, ss. 57, 61; 6 G. 4, c. 109, s. 73, as to penal actions for offences against the laws of excise or customs. In an action on stat. 2 G. 2, c. 24, for bribery at an election, the court stayed the proceedings; because the plaintiff had been guilty of a wilful delay in prosecuting the action (e); and even after verdict, they have stayed proceedings, upon the clause of discovery (f).

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In Penal Actions by Common Informers.

In Actions by Outlaws and alien Enemies.] The court have stayed the proceedings after judgment recovered and affirmed on a writ of error, on the defendant's bringing the debt and costs into court, the plaintiff having been outlawed in another action; for, if the defendant were to pay the money to the plaintiff, he might be paying that which the crown would be entitled to have paid over again (g). But the court have refused to stay proceedings upon the ground that the plaintiffs, after verdict, had become alien enemies (h).

In Actions by Outlaws and alien Enemies.

In Actions against Bankrupts.] Under the 6 G. 4, c. 16, s. 120, which authorizes the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the court has incidentally a power of staying, before judgment, proceedings against such a bankrupt for such a debt (i).

In Actions against Bankrupts.

In other Cases.] In an action on a promissory note, the court granted a rule to shew cause why the proceedings should not be stayed, upon an affidavit that the note had been obtained without consideration; and that fact not being afterwards contradicted upon shewing cause, the court made the rule absolute (k). In general, however, the court will not stay the proceedings in an action merely on the ground that the action will not lie (l). Where a client brought an action against his attorney for negligence, and recovered, the jury finding that the attorney was guilty of gross negligence; the attorney then brought an action for the amount of his bill of costs; the court refused to stay the proceedings as to this latter action (m).

In other Cases.

On ground that an Action will not lie.

(a) See Vol I. p. 1.

(b) See *Smith v. Potter*, 1 Str. 415: *White v. Boot*, 2 T. R. 274. *Leigh v. Kent*, 3 T. R. 363.

(c) 36 G. 3, c. 104, s. 38.

(d) See 44 G. 3, c. 98, s. 10.

(e) *Petrie v. White*, 3 T. R. 5.

(f) *Sutton v. Bishop*, 4 Burr. 2287.

(g) *Grant v. Bryant*, 6 M. & Sel. 347.

(h) *Vanbrymen v. Wilson*, 9 East, 321:

but see *De Luneville v. Phillips*, 2 N. R. 97.

(i) *Ante*, 905: *Sadler v. Cleaver*, 5 Moo. & P. 706; 7 Bing. 769, S. C.

(k) *Tidd*, 530; *sed quære?*

(l) See *Sherwood v. Benson*, 4 Taunt. 631; *Tidd*, 530: *Smith v. Curtis*, 2 Dowl. 223.

(m) *Smith v. Roit*, 2 Dowl. 62.

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PART I.On Set-off
of mutual
Claims.

Where a prisoner in execution for 200*l.* sued his plaintiff for 11*l.*, and held him to bail, the Court of Common Pleas stayed the proceedings, upon the latter's acknowledging satisfaction to the extent of the 11*l.*, and 5*l.*, to answer costs on the judgment for 200*l.* which he had obtained against the former(*n*). So, if an action be commenced for a matter which had been set off and allowed in a former action between the same parties, the court, it seems, would stay the proceedings(*o*).

On Transfer
of Bill of Ex-
change pend-
ing the Ac-
tion.

Where the plaintiff, in an action on a bill of exchange, deposited the bill as a security with another person after action brought, giving him at the same time notice of the action, the Court of Common Pleas held, that this was no ground for staying proceedings; but intimated, that if the person with whom the bill was deposited had brought a second action upon it, they would interfere to stay that action(*p*).

In Action
against good
Faith.

If an action be brought pending a reference, which it has been agreed shall operate as a stay of proceedings, or otherwise contrary to good faith, the court or a judge will stay the proceedings(*q*). So where a juror has been withdrawn, by the plaintiff, at the suggestion of the judge, on the understanding that the cause was to be put an end to, the court will not allow the plaintiff afterwards to proceed(*r*).

WhataBreach
of a Rule
staying Pro-
ceedings.

What a Breach of a Rule staying Proceedings.] Any proceeding, even a motion to enlarge another rule in the cause, is a breach of the rule staying proceedings(*s*).

(*n*) *Peacock v. Jeffrey*, 1 Taunt. 426: and see Vol. I. 457.

(*o*) See *Laing v. Chatham*, 1 Camp. 252; and Vol. I. 322. See as to this being a good defence to the action by way of estoppel, *Eastmure v. Lawes*, 5 Bing. N. C. 444.

(*p*) *Marsh v. Newell*, 1 Taunt. 109; and see *Colombies v. Slim*, 2 Chit. Rep. 637.

(*q*) Tidd, 9th ed. 529; 2 Lord Raym. 789: see *Moscatti v. Lawson*, 1 H. & W. 582.

(*r*) *Harries v. Thomas*, 2 M. & W. 32: see Vol. I. p. 285.

(*s*) *Wyatt v. Prebbell*, 5 Dowl. 268.

CHAPTER XI.

INTERPLEADER.

CHAP. XI.

THE following important provisions have been enacted by the 1 & 2 W. 4, c. 58, for the purpose of enabling courts of law to give relief against adverse claims made on sheriffs and other officers, and persons having no interest in the subject of such claims.

SECT. 1. *Relief of Persons in general against adverse Claims, 999 to 1003.*

2. *Relief of Sheriffs and other Officers against adverse Claims, 1004 to 1011.*

SECT. 1.

Relief of Persons in general against adverse Claims.

THE 1st section of 1 & 2 W. 4, c. 58, after reciting that "it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a *suit in equity* against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay;" for remedy thereof enacts, "that, upon application made by or on behalf of any *defendant* sued in any of his Majesty's courts of law at Westminster, or in the Court of Common Pleas of the county palatine of Lancaster, or in the Court of Pleas of the county palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit (*a*) or otherwise, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action, in such manner as the court or any judge thereof may order or direct, it shall be lawful for the court, or any judge thereof, to make rules (*b*) and orders, calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and, upon such rule or order, to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action (*c*), and finally to order (*b*) such third party to make himself defendant in the

Adverse Claimants compelled to interplead, &c., and Proceedings stayed.

(a) See form, Chit. Forms, 586.

(b) Id. 587.

(c) In the Exchequer and Common

Pleas, notice of motion must be given, if the rule be intended to operate as a stay of proceedings. (See *post*, 1045).

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same or some other action, or to proceed to trial on one or more *feigned issue or issues* (d), and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the *consent* of the *plaintiff* and such third party, their counsel or attornies, to *dispose of the merits of their claims, and determine the same in a summary manner*, and to make such *other rules and orders* therein, as to *costs* and *all other matters*, as may appear to be just and reasonable" (e).

Judgment
and Decision
final.

By sect. 2, "the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

Claim of Par-
ty not appear-
ing, barred.

By sect. 3, "if such *third party* shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith (f), or shall *neglect or refuse to comply with any rule or order* to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be *for ever barred from prosecuting his claim against the original defendant*, his executors or administrators, (saving nevertheless the right or claim of such *third party* against the *plaintiff*), and thereupon to make such order between such defendant and the plaintiff, as to *costs* and other matters, as may appear just and reasonable."

Order of
Judge may be
rescinded,
&c.

By sect. 4, "no order shall be made in pursuance of this act by a single judge of the Court of Pleas of the said county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster; and that every *order* to be made in pursuance of this act by a *single judge*, not sitting in open court, shall be liable to be *rescinded or altered by the court*, in like manner as other orders made by a single judge."

Judge may
refer the Mat-
ter to the
Court.

By sect. 5, "if upon application to a *judge* in the first instance, or in any latter stage of the proceedings, he shall think the matter more fit for the decision of the *court*, it shall be lawful for him to refer the matter to the court; and thereupon the court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge."

Proceedings
may be en-
tered of Re-
cord, &c.

By sect. 7, "all rules, orders, matters, and decisions to be made and done in pursuance of this act, (except only the affidavits to be filed), may together with the declaration in the cause (if any) be *entered of record*, with a note in the margin expressing the true date (g) of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order *so entered* shall have the *force and effect* of a *judgment*, (except only as to becoming a charge on any lands, tenements, or hereditaments) (h), and in case any *costs* shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party

(d) As to the proceedings on a feigned issue, see *ante*, Vol. I. 644.

(e) 1 & 2 W. 4, c. 58, s. 1.

(f) See form of rule, Chit. Forms, 587.

(g) See *Lambirth v. Barrington*, 4 Dowl. 126; 2 Bing. N. C. 149, S. C.

(h) *Semble*, it would be a charge since 1 & 2 V. c. 110, s. 18.

ordered to pay the same, his agent or attorney, *execution may* issue for the same by *fieri facias* or *capias ad satisfaciendum*, adapted to the case, together *with* the costs of such entry, and of the execution, if by *fieri facias*; and such writ and writs may bear *teste on the day of issuing the same*, whether in term or vacation(*h*); and the *sheriff or other officer* executing any such writ shall be entitled to the same *fees*, and no more, as upon any similar writ grounded upon a judgment of the court."

This act is confined to the actions therein mentioned, *viz.* of *assumpsit*, debt, detinue, and trover; and therefore, where the declaration contained a count in *case* as well as trover, the court would not interfere(*i*). It does not take away the party's remedy by bill of interpleader in equity; but, if he has proceeded in equity, the common law courts will not, in general, afterwards interfere(*j*). It applies only to claims to property, in its nature distinct and tangible, and not to actions for unliquidated damages(*k*). Trover for title-deeds is not within the act(*l*). Nor is a contested claim to a reward advertised for the apprehension of a felon(*m*). And where a party gave a promissory note for money due by him, which note was deposited with a third person, as trustee for the creditor, and an action was brought upon it by the trustee, relief was refused, though an action by the creditor was anticipated(*n*). An action must be brought before the court will interfere; a mere *threat* of an action is not sufficient(*o*): where the defendant obtained a rule under the act, upon the suggestion that a third party claimed the amount in his hands for which he was sued, and it afterwards appeared that the defendant had no just expectation that he should be sued by the third party, the court discharged the rule with costs(*p*). A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under this act against the claims of the plaintiff and of such third party, if he has taken an indemnity from the claimant; for he has thereby identified himself with the claimant(*q*), and the act expressly excludes defendants who collude with the third party. So, if a defendant officiously interposes in the affairs of another, and so has placed himself in a difficulty between adverse claims, the court will, in its discretion, generally refuse to relieve him(*r*). In a joint action of trover against two defendants, one of them who claims no title to the goods is entitled to the benefit of the act(*s*). A party may be a claimant within the act, although he claims a lien on the goods against all parties(*t*). And where goods consigned to A., and warehoused at the London Docks, were claimed by B.; and the Dock Company, having

What Actions
and Cases
within the
Act.

(h) See also the 3 & 4 W. 4, c. 67, s. 2.

(i) *Lawrence v. Matthews*, 5 Dowl. 149.

(j) *Sturges v. Claude*, 1 Dowl. 305; *Arayne v. Lloyd*, 1 Bing. N. C. 720; 1 Scott, 609, S. C.

(k) *Watter v. Nicholson*, 6 Dowl. 517.

(l) *Smith v. Wheeler*, 1 Gale, 163.

(m) *Grant v. Fry*, 4 Dowl. 135; *Collis v. Lee*, 1 Hodges, 204.

(n) *Newton v. Moody*, 7 Dowl. 582.

(o) *Parker v. Linnett*, 2 Dowl. 562.

(p) *Harrison v. Payne*, 2 Hodges, 107.

(q) *Tucker v. Morris*, 1 Dowl. 639; 1 C. & M. 73, S. C.

(r) *Belcher v. Smith*, 9 Bing. 82; 2 M. & Scott, 184, S. C.

(s) *Gladstone v. White*, 1 Hodges, 386.

(t) *Cotter v. Bank of England*, 2 Dowl. 728; 3 M. & Scott, 180, S. C.

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required an indemnity of A., the original consignee, before delivering them to him, A., refused, and brought an action of trover, with counts for special damage for the detention: on motion by the company for relief, under the Interpleader Act, B., not appearing upon due notice, the court held that the claim of B. against the company was barred; but that A. ought not, by reason of that act, to be precluded from recovering for his special damage, if any (*u*). But where a wharfinger, against whom an action of trover was brought, and who retained possession of the goods, the subject of the action, under a claim of lien, applied to the court that a third party, who claimed in opposition to the plaintiff, should be made defendant in his stead, and pay off his lien; the court thought the case not within the act, the defendant himself setting up a claim (*x*).

Decision as to
the Rule and
subsequent
Proceedings.

If the party who has no interest is sued by the interested claimants in two different courts, he must, to relieve himself under the above act, if he applies to the court, obtain rules in both courts (*y*). And if part of a sum claimed by the parties has been paid to one of them before an adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder's applying for relief under the act (*y*). On an application to a judge at chambers, under the Interpleader Act, an order having been made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed, the court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers (*z*). And where the plaintiff, in an issue directed under the act, does not proceed to the trial of it, the court will not permit another person's name to be substituted, without making the plaintiff originally appointed a party to the rule (*a*).

Until the judgment in the action or issue is obtained, neither of the parties is, in general, secure against future claims by the other for the same matter (*b*). Until judgment is signed, money, which has been paid into court on a feigned issue under this act, will not be allowed to be taken out by the successful party (*c*). The rule to take the money out of court is *nisi* only, in the first instance (*d*).

Costs in ordi-
nary Cases.

If the party making the application under the act acts *bonâ fide*, he will, in the first instance, be allowed his costs of the application out of the fund or proceeds of the goods in dispute, and the party ultimately unsuccessful will have to repay them (*e*); and it seems that the failure to proceed of the party in the wrong does not affect the right of the applicant to receive his costs out of the fund, and the successful party will be left to his remedy by

(*u*) *Lucas v. London Dock Company*, 4 Dowl. 728; 2 Moo. & Sc. 714, 810; 9 B. & Ad. 378: see *Crawshay v. Thornton*, 2 Myl. & Cr. 1.

(*x*) *Braddock v. Smith*, 9 Bing. 84; 2

Moo. & Scott, 131, S. C.

(*y*) *Allen v. Gilby*, 3 Dowl. 143.

(*z*) *Drake v. Brown*, 2 M. & R. 270.

(*a*) *Liddall v. Biddle*, 5 Dowl. 244.

(*b*) *Cooper v. Lead Smelting Company*, 1

(*c*) See Id.

(*d*) *Stanley v. Perry*, 1 H. & W. 669.

(*e*) *Parker v. Linnett*, 2 Dowl. 562; *Cotter v. Bank of England*, 2 Dowl. 728; 3 Moo. & Sc. 180, S. C.; *Duer v. Mackintosh*, 2 Dowl. 730; 3 Moo. & Scott, 174, S. C.; *Agar v. Bleghegn*, 1 T. & G. 160.

action for the deduction, even though the party in the wrong be insolvent (*f*). In a case where he was offered an indemnity, and refused it, the court would not allow him his costs (*g*). In general, if the claimant does not appear, the court will not order him to pay the costs of applying to the court, nor such costs to be paid out of the fund in dispute (*h*). The successful party is entitled to his costs of applying to take the money out of court, or to have the property in dispute delivered to him by the stakeholder, though he has not previously applied to the opposite party (*i*).

The practice as to making the entry in pursuance of the above enactment, taxing costs, and suing out execution, as pointed out by Mr. Chapman, in his second Addenda to his Practice (*k*), is as follows:—*The entry must be upon a judgment-roll, commencing with the declaration in the cause (if any); then follows the rule, order, or decision of the court or judge on the application. Make out a docket-paper (l). Take the roll to one of the masters, who will number the roll. He will make the proper entry, and the roll must then be carried into the treasury in the same manner as judgment-rolls are. When costs are given by any rule or order, the party entitled to such costs must obtain from the master an appointment on the rule to tax such costs; a copy of the rule and appointment must be served the day prior to the taxation of costs on the opposite attorney. After taxation of the costs, notice in writing (l) must be given of the amount of costs allowed to the party ordered to pay the same, or to his attorney or agent; and if the costs are not paid within fifteen days after such notice, a fieri facias or capias ad satisfaciendum (m) may be issued for the same, and the party may, in addition to the costs allowed, levy for the costs of the fieri facias, but not for the costs of the ca. sa. The fifteen days' notice must be given, whether the party, his attorney, or agent, attend the taxation of costs or not. The most effectual way of giving notice of the amount of costs allowed on taxation will be, by service of a copy of the rule of court, with the master's allocatur for costs thereon, on the party required to pay the same, his attorney, or agent, with an indorsement stating, that, unless the amount allowed for costs be paid within fifteen days, execution will be issued for the recovery thereof. The notice does not require personal service (n). It may be here added, that a judgment, even after verdict on a feigned issue under the Interpleader Act, must be entered up as sect. 7 of that act directs, and a judgment signed in the ordinary manner on such issue will be set aside on application to the court (o).*

Entering Pro-
ceedings on
Record, Exe-
cution, &c.

(*f*) *Pitchers v. Edney*, 4 Bing. N. C. 721.

(*g*) *Gladstone v. White*, 1 Hodges, 386.

(*h*) *Lambert v. Cooper*, 5 Dowl. 547.

(*i*) *Meredith v. Rogers*, 7 Dowl. 596: *Barnes v. Bank of England*, 7 Dowl. 319.

(*k*) Chap. II. Addenda, p. 162.

(*l*) See form, Chit. Forms, 590.

(*m*) Id. 591.

(*n*) Chapman's Second Addenda to his Practice, 162 to 166.

(*o*) *Dickenson v. Eyre*, 7 Dowl. 721.

Relief of Sheriffs and other Officers against adverse Claims.

Relief of Sheriff, &c., before 1 & 2 W. 4, c. 58.

BEFORE the passing of the 1 & 2 W. 4, c. 58, if the property in goods taken under an execution were in dispute, as frequently happens in the case of bankruptcy, &c., the court, upon the suggestion of this or any other reasonable cause, by the sheriff, would enlarge the time for making the return, until the right were tried, or until one of the parties had given the sheriff a sufficient indemnity (*p*). This, however, was not to be considered a general rule; but the indulgence was granted only in special cases, under particular circumstances; because the sheriff, where the property is in dispute, might, as he still may, summon an inquest to say whose property it is, before he returns the writ. But, in all cases where the doubt arose from a point of law, and not from mere matter of fact, the court, upon application, would enlarge the time for making the return (*q*); therefore, where the doubt was, whether goods seized under a *fi. fa.* were not covered by an extent afterwards sued out, the court enlarged the time for making the return to the *fi. fa.*, for the purpose of inducing the plaintiff to go into the Court of Exchequer, and there contest the question of right with the crown (*r*). The sheriff or officer, if he think fit, notwithstanding the act of 1 & 2 W. 4, c. 58, may, as heretofore, apply to the court to enlarge the time for making his return: and in some cases, not within the act, such application would be expedient.

Relief of Sheriff by Interpleader under 1 & 2 W. 4, c. 58.

Now, however, a much more effectual relief is afforded to sheriffs and other officers in such cases by the above act, section 6, of which, after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers," enacts, "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application (*s*) of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought (*t*) against such sheriff or other officer, to call before them, by rule of court (*u*), as well the party issuing such process, as the party making such claim, and thereupon to exercise for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authori-

(*p*) *Semb. Wells v. Pickman*, 7 T. R. 174; *Shaw v. Tunbridge*, 2 W. Bl. 1064, 1181; and see *King v. Bridges*, 7 Taunt. 294; 1 Bing. 71, S. C.; *Bernasconi v. Farebrother*, 7 B. & C. 379; *Beavan v. Dawson*, 4 Moo. & P. 387; 6 Bing. 566, S. C.; *Tidd*, 9th ed. 1017.
(*q*) See *George v. Birch*, 4 Taunt. 585.

(*r*) *Wells v. Pickman*, 7 T. R. 174; *Thurston v. Thurston*, 7 Taunt. 120.
(*s*) See form of affidavit, Chit. Forms, 588.
(*t*) *Green v. Brown*, 3 Dowl. 337.
(*u*) See form of a rule, Chit. Forms, 589; *Parker v. Booth*, 1 Moo. & Scott, 156; 8 Bing. 85, S. C.

ties hereinbefore contained, and make such rules (r) and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court."

And by the 1 & 2 V. c. 45, s. 2, "it shall be lawful for any judge of the Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the said Court of Common Pleas of the county palatine of Lancaster, or Court of Pleas of the county palatine of Durham, (being also a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham, respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer, as may by virtue of the said last-mentioned act be exercised by the said several courts respectively, and to make such order therein as shall appear to be just; and the costs of such proceeding shall be in the discretion of such judge (x).

Application
for Relief
may be at
Chambers.

The court will not interfere under this act for the sheriff, unless an actual claim to the property has been made; and the claim must, it seems, be of such a nature as may be followed by an action (y); though an action need not be actually brought before making the application (z). And the court may give relief, though the claimant be an infant (a). Giving notice of a fiat in bankruptcy having been issued is not equivalent to a claim by the assignees (b). A person in actual possession of the goods seized under a *fi. fa.* against the defendant is still a claimant within the act (c). The fact of the goods seized being in the possession of a stranger, and not of the defendant against whom the execution issued, does not prevent the sheriff from making the application under the act (d). And, although the act, from its language, may seem to have in view only those cases in which the absolute property is claimed, yet the letter of the act will comprehend cases of lien (e). Where goods had been taken by the sheriff under a *fi. fa.* and sold by him, another *fi. fa.* having issued in the meantime against the same goods, and where a party claimed title to the property against both the plaintiffs, the defendant, and the sheriff, and complained that the goods had been sold improvidently, and in spite of notice from the owner, the court made a special order for relief of the sheriff, under the act (f). If an execution-creditor abandons his process against certain goods seized under a *fi. fa.* in favour of a claimant, and the sheriff still sells them under it, he may nevertheless apply to the court under the act (g). But the

In what Cases
Relief will be
granted or
not.

(v) See forms, Chit. Forms, 589.

(x) Previously to this enactment, a judge at chambers had no jurisdiction: (*Shaw v. Roberts*, 2 Dowl. 25, S. C.; *Brackenbury v. Laurie*, 3 Dowl. 180; *Smith v. Wheeler*, 1 Gale, 15; 3 Dowl. 431, S. C.; *Poweller v. Loch*, 4 Nev. & M. 352; *Beames v. Cross*, 4 Dowl. 122; *Hailey v. Disney*, 1 Hodges, 189; unless where a *rule nisi* was granted by the court to shew cause at chambers. (*Poweller v. Lock*, 4 Nev. & M. 852; *Beames v. Cross*, 4 Dowl. 122; *Hailey v. Disney*, 1 Hodges, 189; 2 Scott, 183, S. C.) And if process issued out of different courts, directed to the same sheriff, separate application must have

been made to the respective courts out of which the process issued. (*Bragg v. Hopkins*, 2 Dowl. 151).

(y) *Isaac v. Spilsbury*, 10 Bing. 3; 3 Moo. & Scott, 341; 2 Dowl. 211, S. C.

(z) *Green v. Brown*, 3 Dowl. 337.

(a) *Claridge v. Collins*, 7 Dowl. 698.

(b) *Bentley v. Hook*, 2 Dowl. 339; 2 C. & M. 426, S. C.; *Tarleton v. Dummelow*, 5 Bing. N. C. 110, *seem.*: but see *Barker v. Phipson*, 3 Dowl. 590.

(c) *Barker v. Dynes*, 1 Dowl. 169.

(d) *Allen v. Gibbon*, 2 Dowl. 292.

(e) *Ford v. Baynton*, 1 Dowl. 357.

(f) *Howman v. Buck*, 3 B. & Ad. 103.

(g) *Baynton v. Harvey*, 3 Dowl. 344.

BOOK IV.
PART I.

court will not relieve the sheriff, under the act, where he has paid over the proceeds of the execution to the judgment-creditor (*h*); nor where he has handed over any part of the goods to the party claiming them (*i*); nor where the sheriff paid over the proceeds of the execution to the judgment-creditor, even before he had notice of the claim (*k*), or even if he be willing to bring a similar amount into court (*l*). And, where the sheriff finding the goods claimed by a third party withdrew, without making any seizure under a *fi. fa.*, the court held, that as the sheriff had not possession of the goods, and was, therefore, incapable of delivering them to either party, he was not entitled to relief (*m*). Where it appears that the under-sheriff is plaintiff in the action, in which the writ of execution has been issued and executed, the court will not interfere to relieve the sheriff under the act, although the sheriff himself swears, in the usual way, that he does not collude either with the execution-creditor or the claimant whom he seeks to bring before the court, for the adjustment of their respective claims on the property seized (*n*). Nor where the sheriff is placed in circumstances which give him an interest on either side, as where the under-sheriff's partner was concerned for some of the parties, or the like (*o*). Nor will they relieve him where he has seized under one *fi. fa.*, and the question is, whether that writ ought to have precedence of another (*p*). Nor where he has seized goods in execution which were under a distress for rent (*q*); but where the sheriff, having seized goods under a *fi. fa.*, received notice before sale of the landlord's claim for rent in arrear, and afterwards of a fiat of bankruptcy, the court held that the assignees were entitled to the goods, the landlord not having made a distress for his rent (*r*). The act does not apply to claims in equity (*s*), nor to a claim made by a person as a partner of the defendant, on property seized by the sheriff; but the court will, in such a case, compel the plaintiff to indemnify him if he deny the partnership (*t*). If the sheriff has been guilty of neglect, and incurred a liability thereby, the court will not relieve him from such liability (*u*).

Sheriff bound to make Inquiries as to the Claim.

It has been said that the sheriff, before he makes the application, is bound to inquire of the nature of the claim set up by the adverse parties (*x*). And where a levy was made on the 30th October, and a claim was made on the 1st November, under a bill of sale of that date, the court discharged the rule, and ordered the sheriff to pay the execution-creditor's costs; observing, that before the sheriff applied to the court, he ought at least to have looked at the date of the bill of sale (*y*).

(*h*) *Anderson v. Calloway*, 1 C. & M. 182; 1 Dowl. 636, S. C.; *Chalon v. Anderson*, 3 Tyr. 327.

(*i*) *Braine v. Hunt*, 2 Dowl. 391; 2 C. & M. 418, S. C.

(*k*) *Scott v. Lewis*, 1 Gale, 204; 4 Dowl. 259; 2 C., M. & R. 289, S. C.

(*l*) *Ireland v. Bushell*, 5 Dowl. 147; 2 H. & W. 118.

(*m*) *Holton v. Guntrip*, 6 Dowl. 130; 3 M. & W. 145, S. C.

(*n*) *Ostler v. Bower*, 4 Dowl. 605; 1 Harr. & W. 653, S. C.

(*o*) *Dudden v. Long*, 3 Dowl. 139; 1 Bing. N. C. 299; 1 Scott, 281, S. C.

(*p*) *Day v. Waldoek*, 1 Dowl. 523: see *Salmon v. James*, Id. 369.

(*q*) *Haythorn v. Bush*, 2 Dowl. 641: see *Clark v. Lord*, Id. 227.

(*r*) *Gethin v. Wilks*, 2 Dowl. 189.

(*s*) *Sturgess v. Claude*, 1 Dowl. 505; *Holmes v. Mentz*, 4 Ad. & El. 127; 5 Nev. & M. 563; 4 Dowl. 300, S. C.

(*t*) *Holmes v. Mentz*, 4 Ad. & El. 127; 5 Nev. & M. 563; 4 Dowl. 300, S. C.

(*u*) *Brackenbury v. Laurie*, 3 Dowl. 180: and see *Lewis v. Jones*, 2 M. & W. 203.

(*x*) *Bishop v. Hinman*, 2 Dowl. 166: see *R. v. Shff. of Oxfordshire*, 6 Dowl. 136.

(*y*) *R. v. Shff. of Oxfordshire*, 6 Dowl. 136.

He need not apply for (*z*), nor is he bound to accept, an indemnity, if offered (*a*). If, however, he accept one, the court will not afterwards interfere under this act (*b*).

CHAP. XI.
SECT. 2.

The application may be made either to the court or to a judge at chambers (*c*). If there be two writs issuing out of different courts, the application, if made in court, must be to each court (*d*).

Indemnity.

Application,
where made.

The application should be made by the sheriff, in a reasonable time after receiving notice of the adverse claim (*e*). Where the sheriff received notice on the 23rd January, of a claim to goods seized by him under a *fi. fa.*, he was held not entitled to relief under the act, on an application made after Hilary Term (*f*). And in a case, before the 1 & 2 V. c. 45, which allows a judge at chambers jurisdiction where the claim was made in the vacation, the court held that the sheriff should have made the application within the first *four* days of the succeeding term; and since that act, he should apply at chambers within a reasonable time, and should not wait for term; and, in the event of laches in this respect, he will have to pay the costs of both parties, and, perhaps, he will be altogether refused (*g*). But under special circumstances the court would interfere on a later application (*h*). Where it was made within eleven days after the notice of the claim, the court heard it (*i*).

Application to
be made
promptly.

The application should be supported by an affidavit, stating the seizure of the goods by the sheriff under the execution, that the goods, or the proceeds of this sale, are in his hands, and the notice of the claim by the party who made it (*k*), and such other facts as may assist in inducing the court to grant the application. No supplemental affidavit will be allowed after the rule *nisi* is obtained, and therefore, if there has been any delay, it should be accounted for in the first affidavit (*l*). The affidavit need not state that the sheriff has made application to the adverse claimants for an indemnity (*m*), nor need it deny collusion with them (*n*). The claimants may appear without taking office copies of the affidavits on which the rule was obtained (*o*). An execution-creditor appearing need not produce an affidavit (*p*). But the claimant must, if he appear to the rule, state the nature of his claim upon an affidavit of the facts (*q*). An affidavit, in shewing cause, may be sworn at any time before cause is shewn (*r*).

Affidavit in
Support of.

(*z*) *Crossley v. Ebers*, 1 H. & W. 216:
Wills v. Popjoy, 10 Leg. Obs. 12.

(*a*) *Levy v. Champneys*, 2 Dowl. 454.

(*b*) See *Ostler v. Bower*, 4 Dowl. 605.

(*c*) 1 & 2 V. c. 45, s. 2; *ante*, 1005.

(*d*) *Bragg v. Hopkins*, 2 Dowl. 151.

(*e*) *Devereux v. John*, 1 Dowl. 548:
Cooke v. Allen, 2 Dowl. 11; 1 C. & M.
542, S. C.: *Dixon v. Ensell*, 2 Dowl. 621:
Barker v. Phipson, 3 Dowl. 590.

(*f*) *Ridgway v. Fisher*, 3 Dowl. 567.

(*g*) *Beale v. Overton*, 2 M. & W. 534;
5 Dowl. 599, S. C.: and see *Barker v.*
Phipson, 3 Dowl. 590; 1 H. & W. 191,
S. C.: *Sableman v. Claringbold*, 2 H. & W.
87; in which latter case, the seizure of
the goods was long before the claim was
made; and the delay not being satisfac-
torily accounted for, the court refused to
relieve the sheriff.

(*h*) *Dixon v. Ensell*, 2 Dowl. 621.

(*i*) *Skipper v. Lane*, 2 Dowl. 781; 4 M.
& Scott, 283, S. C.

(*k*) *Northcote v. Beauchamp*, 1 M. &
Scott, 158.

(*l*) *Cooke v. Allen*, 2 Dowl. 11; 1 C. &
M. 542; 3 Tyr. 586, S. C.

(*m*) *Crossley v. Ebers*, 1 H. & W. 216:
Wills v. Popjoy, 10 Leg. Obs. 12: see
Levy v. Champneys, 2 Dowl. 454.

(*n*) *Donniger v. Hin man*, 2 Dowl. 424:
Dobbins v. Green, Id. 509; *sed vide Cooke*
v. Allen, Id. 11; 1 C. & M. 542; 3 Tyr.
586, S. C.: *Anderson v. Calloway*, 1 C. &
M. 182; 1 Dowl. 636, S. C.

(*o*) *Mason v. Redshaw*, 2 Dowl. 595.

(*p*) *Angus v. Wootton*, 3 M. & W. 310.

(*q*) *Powell v. Lock*, 1 H. & W. 281; 4
Nev. & M. 852; 3 Ad. & E. 315, S. C.

(*r*) *Brame v. Hunt*, 2 Dowl. 391.

BOOK IV.
PART I.Who entitled
to resist the
Application.Proceedings
on the Hear-
ing where the
Parties ap-
pear.Where some
of the Parties
do not appear.Costs on Ap-
plication by
Sheriff.
In general.

No one has a right to be heard against the rule obtained by the sheriff, unless he is called upon by it, although he is in fact a claimant; and if he is called upon in one character, he cannot appear in another(s). Where, however, after the rule nisi had been obtained, the defendant became bankrupt, his assignees were admitted as parties to the rule(t).

The court will not, on the hearing of the motion, if there be any doubt, try the respective merits of the claimants, but they will direct an issue to try them, or else an action against the sheriff(u). In the feigned issue it seems that the claimant should, in general, be the plaintiff, and the execution-creditor the defendant(x). Or, instead of directing an issue or action, the court may discharge the rule, in which case the sheriff is entitled to a reasonable time to return the writ before an attachment can issue(y), or with the consent of the plaintiff and the party making the claim, the court will dispose of the merits of their claims, and determine the same in a summary way(z). Where the court directed a feigned issue or action, they will order the proceedings against the sheriff to be stayed until the trial of the feigned issue or action; and in the meantime give such directions respecting the sale of the goods and application of the proceeds, or value thereof, as shall appear to be just(a).

As to the mode of making up and proceeding on the issue, see *Vol. I. 644, &c.*

If the adverse claimant does not, upon the sheriff's rule, appear and support his claim, the court will bar it as against the sheriff, saving, nevertheless, his right against the execution creditor(b). And if the execution-creditor does not upon such rule appear, the court will bar his claim(c) in respect of the matters brought in question by the rules, and the rule will be, not that the execution-creditor shall be barred of his demand generally, but that the sheriff shall withdraw from possession, and that the execution-creditor take no proceedings against him in respect of the goods claimed(c). Or if the sheriff have sold, the court will direct him to pay over the produce of the sale to the claimant. Where neither the claimant nor the creditor appeared, the court directed the sheriff to sell so much as would satisfy his poundage and expenses, and to abandon the rest(d). If an execution-creditor abandon his process against certain goods seized under a *fi. fa.* in favour of the claimant, the sheriff may still shew, in an action against him, that the goods were the defendant's property(e).

The costs are in the discretion of the court(f). Where no great blame appears to attach either to the execution-creditor, the claimant, or the sheriff, each party will have to pay his own costs attending the application(g).

(s) *Clarke v. Lord*, 2 Dowl. 55.(t) *Kirk v. Clarke*, 4 Dowl. 363.(u) *Allen v. Gibbons*, 2 Dowl. 292; *Brambridge v. Adshead*, Id. 59; *Badcock v. Beauchamp*, 8 Bing. 86; 1 Moo. & Sc. 158, S. C.; *Slowman v. Back*, 3 B. & Ad. 103.(x) *Brambridge v. Adshead*, 2 Dowl. 59.(y) *Rex v. Sheriff of Hertfordshire*, 5 Dowl. 144; 2 H. & W. 122, S. C.(z) *Ford v. Baynton*, 1 Dowl. 357; *Curlow v. Pocock*, 5 Dowl. 381.(a) *Tidd*, New Pract. 580.(b) See *Bowlder v. Smith*, 1 Dowl. 417; *Perkins v. Burton*, 3 Tyr. 51; 2 Dowl. 108; *Twogood v. Morgan*, 3 Tyr. 52 a.(c) *Doble v. Cummins*, 7 Ad. & El. 580; 2 Nev. & P. 75, S. C.; *Ford v. Dillon*, 5 B. & Ad. 885; 2 Nev. & M. 662, S. C.; but see *Donniger v. Hinxman*, 2 Dowl. 424.(d) *Eveleigh v. Salisbury*, 3 Bing. N. C. 298; 5 Dowl. 369, S. C.(e) *Baynton v. Harvey*, 3 Dowl. 344.

(f) Sect. 6.

(g) *Morland v. Chitty*, 1 Dowl. 520:

If the court discharge the sheriff's rule, they frequently order him to pay the costs(*h*); and they will invariably do so, if the sheriff did not, before making the application, make some inquiries into the nature of the adverse claim(*i*). Where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the court will make the sheriff pay the costs of appearing(*k*). And where the court had ordered the sheriff to pay the rent upon the landlord's giving security, and also to pay his costs, it was holden, that the sheriff was liable to pay the expense of the security(*l*).

CHAP. XI.
SECT. 2.

Costs, when
payable by
the Sheriff.

Where an adverse claim is set up to goods seized by the sheriff under an execution, and the latter applies for relief under the act, and the adverse claimant does not appear to support his claim, the court will make him pay the judgment-creditor his costs of appearing on the sheriff's rule(*m*); and the Court of Exchequer, and perhaps the Court of Queen's Bench, will also make him pay the sheriff's costs of the rule(*n*); but if the rule does not pray for costs, the order upon the claimant in such case to pay the costs is only conditional, unless he shew cause within four days(*o*). On the other hand, if in such a case the adverse claimant does appear on the sheriff's rule, and the judgment-creditor does not, the court will not, according to some cases, order the latter to pay the adverse claimant's costs; for the judgment-creditor is not bound to appear when there are no goods liable to his execution(*p*). If the claimant refuses to try the issue directed to be tried between him and the execution-creditor, and abandons his claim, he will be liable to pay the latter's costs down to the time of the claim being abandoned, and of applying to take out of court the money paid in by the sheriff(*q*); also the costs of the sheriff from the time of directing the issue(*r*). And so if he neglect to pay money into court in pursuance of an order for that purpose, and this, perhaps, without a previous application having been made to him(*s*). The court may adjudicate as to the costs of appearing to the sheriff's rule, and of an issue directed to be tried under it, although the trial of it has taken place(*t*). But generally, where the issue has been tried, the unsuccessful party is liable, as of course, for the costs(*u*). And where an issue was directed between the claimant and execution-creditor, the costs of which were to abide the order of the court, and the claimant, though he claimed the whole of the goods seized, yet proved his right to part only; it was held, that he was entitled to the general

Costs between
the Claimant
and Creditor.

Clarke v. Lord, 2 Dowl. 55: *Oram v. Sheldon*, 3 Dowl. 640: 1 Scott, 697, S. C.: *Dixon v. Ensell*, 2 Dowl. 621.

(*h*) See *Anderson v. Colloway*, 1 C. & M. 182; 1 Dowl. 636, S. C.: *Re Sheriff of Oxfordshire*, 6 Dowl. 136.

(*i*) *Bishop v. Hineman*, 2 Dowl. 166.

(*k*) *Clarke v. Lord*, 2 Dowl. 55.

(*l*) *Clarke v. Lord*, 2 Dowl. 227.

(*m*) *Bowdler v. Smith*, 1 Dowl. 417: *Perkins v. Burton*, 2 Id. 108: *Tomlinson v. Done*, 1 H. & W. 123.

(*n*) *Philby v. Ikey*, 2 Dowl. 222: and see *Lewis v. Eicke*, Id. 334: *aliter* in C. P. *Oram or Thompson v. Sheldon*, 3 Dowl. 640, 1 Scott, 697, S. C.

(*o*) *Perkins v. Burton*, 2 Dowl. 108:

Shuttleworth v. Clarke, 4 Dowl. 561.

(*p*) See *Glazier v. Cooke*, 5 Nev. & M. 680: *sed vide Bryant v. Ikey*, 1 Dowl. 428: *Benwick v. Thomas*, 5 Dowl. 458.

(*q*) *Wills v. Hopkins*, 3 Dowl. 346.

(*r*) *Scales v. Sargeson*, 4 Dowl. 231.

(*s*) *Scales v. Sargeson*, 3 Dowl. 707; 4 Dowl. 321.

(*t*) *Seaward v. Williams*, 1 Dowl. 528: and see *Levy v. Champneys*, 4 Ad. & El. 365.

(*u*) *Bowen v. Bramridge*, 2 Dowl. 213: *Armitage v. Foster*, 1 H. & W. 208: and see *Matthews v. Sims*, 4 Dowl. 234; where it was directed at chambers by consent.

BOOK IV.
PART I.

costs of the issue as if he had been plaintiff in trover, and also to the costs of the original and subsequent applications to the court (*v*). Before making any application to the court for these costs, it seems they should first be demanded of the opposite party, otherwise the costs of the application would not be allowed, if it were resisted only on the ground of such costs (*x*). But the successful party is entitled to the costs of a rule for taking the money out of court, or for having the property in dispute delivered to him by the stakeholder, though he has not applied for the consent of the other party (*y*). The affidavit in support of an application to the court for costs, where the claimant relinquishes his claim, must be entitled in the names of the parties in the original cause (*z*). The application by a successful party for costs may be made before judgment actually signed; but the rule must be drawn up on condition of its being signed (*a*).

What Poundage and Costs the Sheriff is entitled to.

The court will not, in general, allow the *sheriff* his costs, the act being passed for his relief, and his claim to poundage depending on the legality of the seizure; consequently the court will, in general, order him to pay the proceeds of the goods seized into court, without allowing him to deduct such poundage (*b*). His right to poundage will then depend upon the event of the issue (*c*). And the court will not allow the sheriff his costs incurred by keeping possession in consequence of a party (before 1 *V. c.* 45, giving a judge at chambers jurisdiction in this case) refusing to consent to a judge at chambers making an order in the case, no authority for that purpose being given by the act (*d*). And if, after an order for an issue has been made, the parties come to an arrangement, the sheriff will not be entitled to costs, unless the conduct of the parties be vexatious (*e*). But where, upon a rule obtained by the sheriff, neither the execution-creditor nor the claimant appeared after service of the rule, the court ordered so much of the goods to be sold as would satisfy the sheriff's poundage and expenses, and the rest to be abandoned (*f*). Where the adverse claimant or execution-creditor, after a rule absolute is made on the first application, appears and opens the rule, the court will grant the sheriff his costs of his second appearance (*g*). And the court will allow the sheriff such expenses as he may incur as agent of the parties *after* his application (*h*). And the court will allow the sheriff the expenses of a sale effected under the authority of the court, for the benefit of all parties, though it appears on the trial of the issue that the sale was wrongful (*i*). Also where a claimant abandons his claim after an application under the Interpleader Act, and after an issue

(*v*) *Staley v. Bedwell*, 2 Per. & D. 309.

(*x*) *Bowen v. Bramridge*, 2 Dowl. 213: see *Scales v. Sargeson*, 3 Dowl. 707.

(*y*) *Meredith v. Rogers*, 7 Dowl. 596: *Barnes v. Bank of England*, 7 Dowl. 319.

(*z*) *Elliott v. Sparrow*, 1 H. & W. 370.

(*a*) *Bland v. Delano*, 6 Dowl. 293.

(*b*) *Bowdler v. Smith*, 1 Dowl. 417:

Barker v. Dynes, Id. 169: *Bryant v. Ikey*, Id. 428: *Field v. Cope*, Id. 567; 2 C. & J. 567; 2 C. & M. 480, S. C.: *Oram or Thompson v. Sheldon*, 3 Dowl. 640; 1 Scott, 697, S. C.: and see *The King v. Cooke*, 1 M'Clel. & Y. 198; *Beswick v. Thomas*, 5 Dowl. 458: *Armitage v. Foster*,

1 H. & W. 208: *West v. Rotherham*, 2 Bing. N. C. 527; 2 Scott, 802; 1 Hodges, 461, S. C.: *Staley v. Bedwell*, 2 Per. & D. 309, per Littleale, J.

(*c*) *Barker v. Dines*, 1 Dowl. 169, per Parke, J.

(*d*) *Clarke v. Chetwode*, 4 Dowl. 635.

(*e*) *Cox v. Fenn*, 7 Dowl. 50.

(*f*) *Eveleigh v. Salisbury*, 3 Bing. N. C. 298; 5 Dowl. 369, S. C.

(*g*) *Bryant v. Ikey*, 1 Dowl. 428.

(*h*) *Dabbs v. Humphries*, 3 Dowl. 377; 1 Hodges 4; 1 Bing. N. C. 412; 1 Scott, 325, S. C.

(*i*) *Brown v. Delano*, 6 Dowl. 293.

directed by the court, the sheriff is entitled to his costs from the time of directing the issue, and of the application for those costs(*k*). So where an execution-creditor appeared under the Interpleader Act, and consented with the claimant that the sheriff should sell the goods, and that their produce should abide the event of an issue to be tried, but subsequently abandoned his claim, the court compelled him to pay the sheriff the costs of selling the goods(*l*); where there had been great delay, however, on the part of the sheriff, in applying to the court, in consequence of negotiations between the parties, and the execution-creditor afterwards abandoned his claim, the court ordered each party to pay his own costs(*m*). ■

Entering Proceedings, Execution, &c.] *The practical directions, (ante, 1003), as to the mode of entering the proceedings on record, and taxing costs, and suing out execution on a rule obtained under the above enactment, on behalf of the sheriff, &c., will be here applicable.* Entering Proceedings, Execution, &c.

The court has no power, under the act, to order rules made under it to be entered up, otherwise than as appointed in the seventh section, *viz.* according to their true date(*n*).

It may here be added, that, where the sheriff has been allowed to withdraw from possession under the Interpleader Act, he cannot, after he is out of office, be compelled to re-enter, whatever be the upshot of the question between the parties(*o*). Also even where the sheriff's rule is discharged, he is entitled to a reasonable time after the rule is disposed of for making his return, and therefore an attachment issued against him on the day on which the rule was discharged, has been held irregular(*p*). Compelling Sheriff to re-enter, &c.

(*k*) *Scales v. Sargeson*, 4 Dowl. 231.

(*l*) *Dabbs v. Humphries*, 1 Scott, 325; 1 Hodges, 4; 1 Bing. N. C. 412; 3 Dowl. 377, S. C.; and see *Underden v. Burgess*, 4 Dowl. 104; *Armitage v. Foster*, 1 H. & W. 208.

(*m*) *Dixon v. Ensell*, 2 Dowl. 621: and see Tidd, New Pract. 581.

(*n*) *Lambirth v. Barrington*, 4 Dowl. 126; 2 Bing. N. C. 149; 2 Scott, 263, S. C.: see *Dickenson v. Eyre*, 7 Dowl. 721: *ante*, 1003.

(*o*) *Wilton v. Chambers*, 3 Dowl. 12.

(*p*) *Re v. Sheriff of Hertfordshire*, 5 Dowl. 144.

CHAPTER XII.

SECURITY FOR COSTS.

BOOK IV.
PART I.

In what Cases.

Where Plain-
tiff resides
abroad.

In what Cases.] IF the plaintiff, whether suing in an individual or in a representative(*a*) capacity, and whether for his own benefit or that of another(*b*), reside abroad(*c*), or even in Ireland(*d*), or Scotland(*e*), the court or a judge, upon application, will stay the proceedings until he give security for costs, and this although the defendant has no defence on the merits(*f*). So, where a plaintiff in error resides out of the jurisdiction of the court, he may be in like manner compelled to find security for costs; and, in default thereof, the defendant in error will be allowed to proceed on his judgment, notwithstanding the writ of error(*g*). Where there are several plaintiffs, however, if any one of them reside in this country, the court will not, in general, compel this security to be given(*h*). It has been held to be no answer to this application to say, that the plaintiff is in this country, and was so when the action was commenced, unless the affidavit go on to state expressly that he resides, and intends to continue to reside, in this country(*i*). Nor is it any answer to say that the plaintiff is in the possession of money or Exchequer bills in this country, and this notwithstanding the 1 & 2 *Vict. c.* 110(*k*). But where the plaintiff is out of the kingdom, on a mere temporary absence, especially if a seaman, or a foreigner serving on board an English vessel(*l*), or on board a foreign vessel constantly sailing to and from this country(*m*), he will not be compelled to give this security for costs(*n*), unless, as it seems, where the absence commenced before commencing the

(*a*) *Chevalier v. Finnis*, 1 B. & B. 277; 3 Moore, 602, S. C.: *Chamberlain v. Chamberlain*, 1 Dowl. 366.

(*b*) *Youde v. Youde*, 3 Ad. & El. 311.

(*c*) *Pray v. Edie*, 1 T. R. 267; *Lloyd v. Davies*, 1 Tyr. 533; 1 Price, N. R. 11, S. C.

(*d*) *Fitzgerald v. Whitmore*, 1 T. R. 362; *Limerick and Waterford Railway Company v. Fraser*, 1 Moo. & P. 23; 4 Bing. 394, S. C.: *Lewis v. Owens*, 5 B. & Ald. 265; *Maloney v. Smith*, M'Clel. & Y. 213.

(*e*) *Barter v. Morgan*, 6 Taunt. 379; and see *Id.* 20: *Naylor v. Joseph*, 10 Moore, 522.

(*f*) *Edinburgh and Leith Railway Co. v. Dawson*, 7 Dowl. 573.

(*g*) *Lewis v. Owens*, 5 B. & Ald. 265.

(*h*) *Orr v. Bowles*, 1 Hodges, 23, C. P.: *McConnell v. Johnston*, 1 East, 431; *Anon.*, 7 Taunt. 307; *Anon.*, 2 C. & J. 88; 1 Dowl. 300, S. C.: *Doe Bawden v. Roe*, 1 Hodges, 315. But an Irish Company have been compelled to give security for costs, though many of the members resided in England. (*Limerick and Water-*

ford Railway Co. v. Fraser, 4 Bing. 394).

(*i*) *Oliva v. Johnson*, 5 B. & Ald. 908; 1 D. & R. 560, S. C.: *Naylor v. Joseph*, 10 Moore, 522; *Anon.*, 2 Chit. Rep. 152; and see *Gurney v. Key*, 3 Dowl. 559; but see *Durrall v. Mattheson*, 8 Taunt. 711; *Ciragno v. Hassan*, 6 Taunt. 26.

(*k*) *Edinburgh and Leith Railway Co. v. Dawson*, 7 Dowl. 573.

(*l*) *Henshen v. Garves*, 2 H. Bl. 383.

(*m*) *Nelson v. Ogle*, 2 Taunt. 253.

(*n*) *Ford v. Boucher*, 1 Hodges, 58. There the plaintiff was a mariner, and abroad on a voyage, his family being left in this country in lodgings. *Tindal, C. J.*, said, that he could not accede to the general rule laid down in *Wells v. Barton*, 2 Dowl. 160. And see *Kaslen v. Plau*, 1 Moo. & P. 30; *Nelson v. Ogle*, 2 Taunt. 253; *Henshen v. Garves*, 2 H. Bl. 383; *Jacobs v. Stevenson*, 1 B. & P. 96; *Anon.*, 2 Chit. 152; *Cole v. Beale*, 7 Moore, 613; *Taylor v. Fraser*, 2 Dowl. 622; *Boustead v. Scott*, 2 Dowl. 622; *Frodsham v. Myers*, 4 Dowl. 280.

action(o); but the absence must be temporary(p). Nor will the court require this security to be given upon the ground of the plaintiff being about to leave the country(q). Nor will they require it from a plaintiff merely because he is a foreigner, unless he also reside abroad(r). Nor will they require it on the ground of his absence abroad, when such absence is not voluntary; as in the case of naval and military officers, and other persons engaged abroad in the public service. Therefore they would not require it where the plaintiff was a commissioner of the Ionian Islands, filling his office out of this country(s); nor where the plaintiff was an English officer serving in South America(t); nor where he held the offices of port-captain and harbour-master in the island of Barbadoes(u). And, in such cases, it need not appear on the face of the plaintiff's affidavit that he is an Englishman(u).

Where Defendant resides abroad.

In one case, the Court of Common Pleas stayed the proceedings in replevin, until the defendant (who resided out of the jurisdiction of the court) found security for costs(x). But, in other actions, the defendant will not be compelled to give such security; and where both plaintiff and defendant were residing abroad, the court compelled the plaintiff to give security, but would not compel the defendant(y).

In Actions by Peers, Ambassadors, Kings, &c.

In general a peer(z), or a foreign ambassador, or his servant, will not be compelled to give security for costs(a); although ambassadors and their suites, by a fiction of the *ius gentium*, are considered as still resident in the state from which they have been sent, and are not amenable to process in the country in which they actually reside. In two recent cases, the Court of Queen's Bench compelled foreign potentates to give such security, in causes arising out of commercial transactions(b).

In Actions by Infants or Lunatics.

The fact of the plaintiff's being an infant, will of itself afford no ground for compelling him to give security for costs, and this though his *prochein amy* be insolvent(c). But in a case where an infant sued by guardian, who was sworn to be insolvent, the Court of Common Pleas required the latter to give such security, or that his appointment should be revoked(d). Lunacy of the plaintiff is no ground for requiring security for costs(e).

In Ejectment.

In ejectment, if the lessor of the plaintiff be an infant, the

(o) *Wells v. Barton*, 2 Dowl. 160: *Foss v. Wagner*, Id. 499: but see *Ford v. Boucher*, 1 Hodg. 58.

(p) See *Foss v. Wagner*, 2 Dowl. 499. An absence of eighteen months would not, perhaps, be temporary. (See Id.: and see *Wells v. Barton*, Id. 160: *Taylor v. Fraser*, Id. 622: *Gurney v. Key*, 3 Id. 559).

(q) *Willis v. Garbutt*, 1 Y. & J. 511.

(r) *Durrell v. Mattheson*, 8 Taunt. 711: *Ciragno v. Haasan*, 6 Id. 20: see, however, *Oliva v. Johnson*, ante, 1012, n. (k).

(s) *Lord Nugent v. Harcourt*, 2 Dowl. 578.

(t) *O'Lavalor v. Macdonald*, 3 Moore, 77; 8 Taunt. 736, S. C.

(u) *Evering v. Chiffenden*, 7 Dowl. 536.

(x) *Selby v. Crutchley*, 1 B. & B. 505; 4 Moore, 280, S. C. In *Hiskett v. Biddle*, 1 Hodg. 119; 3 Dowl. 634, S. C., the Court of Common Pleas refused to com-

pel the defendant in replevin to give security for costs, on the ground of his poverty.

(y) *Baxter v. Morgan*, 6 Taunt. 379.

(z) *Ferrars (Earl) v. Robins*, 2 Dowl. 636: and see *Lord Nugent v. Harcourt*, 2 Dowl. 578: but see *Lord Aldborough v. Burton*, 9 Leg. Obs. 171, 26th July, 1834, before the Master of the Rolls.

(a) *Duke de Montellano v. Christin*, 5 M. & Sel. 503.

(b) *The Emperor of Brazil v. Robinson*, 5 Dowl. 522; 1 Nev. & P. 817. S. C.: *Otho, King of Greece, v. Wright*, 6 Dowl. 12.

(c) *Anon.*, 1 Marsh. 4: *Yarworth v. Mitchel*, 2 D. & R. 423: and see *Anon.*, 2 Chit. 359.

(d) *Mann v. Berthen*, 4 Moo. & P. 215.

(e) *Steel v. Allan*, 2 B. & P. 437.

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court or a judge, upon application, will stay the proceedings until security be given for costs (*g*), or his guardian undertake for the payment of them (*h*), or some real and responsible person be named as plaintiff (*i*). So, if the lessor of the plaintiff reside abroad (*k*), or die pending the action (*l*), the court or a judge will stay the proceedings in like manner, until such security be given. But where a similar application was made, upon the ground of the lessor of the plaintiff having privilege of parliament, it was refused (*m*). The defendant may also, if necessary, either by motion or summons, compel the plaintiff's attorney to disclose the place of residence of the lessor of the plaintiff; or if the attorney refuse to do so, the proceedings will be stayed until security be given for costs (*n*). No application, however, for this purpose will be entertained after verdict (*o*). Also, if the nominal plaintiff in the ejectment be made plaintiff in the action for mesne profits, the court or a judge will stay the proceedings in this latter action until security be given for costs (*p*).

In Actions by
Bankrupt or
Insolvent.

The court or a judge will not require the plaintiff to give security for costs, merely because he is insolvent, even in a *qui tam* action (*q*), or where he has assigned the debt (*r*), unless where he has actually taken the benefit of the Insolvent Act after action brought, and the assignee has not disclaimed the action (*s*), or where the action is clearly for the benefit of his assignees (*t*). And where, in an action *ex delicto* by a pauper plaintiff, it appeared that he had obtained his discharge under the 1 & 2 *V. c.* 110, after action brought, the court refused to compel security for costs (*u*). And, indeed, where the plaintiff is a pauper the court will not, it seems, entertain the motion unless he has previously been dispaupered (*v*). Also, on the same grounds, the court or a judge will not require an uncertificated bankrupt to give such security (*x*), unless such action be brought for the benefit of the assignees (*y*), or unless where the plaintiff becomes bankrupt after action brought, and the defendant is entitled to judgment as in case of a nonsuit, or the like (*z*). And in an action *ex con-*

(*g*) *Anon.*, 1 Wils. 130: *Throgmorton d. Miller v. Smith*, 2 Str. 932.

(*h*) *Anon.*, Cowp. 128.

(*i*) *Noke v. Wyndham*, 2 Str. 69. See a form, Chit. Forms, 376.

(*k*) *Denn Lucas v. Fulford*, 2 Burr. 1177. *Aliter*, if there be several lessors, and all are not abroad (*ante*, 1012).

(*l*) *Thrustout d. Turner v. Grey*, 2 Str. 1056.

(*m*) *Preston v. Lingden*, 1 Str. 479; 8 Mod. 20, S. C.

(*n*) *Short v. King*, 1 Str. 681: Vol. I. 57.

(*o*) *Ante*, 993: Vol. I. 52.

(*p*) *Pike v. Corbin*, Say. 78.

(*q*) *Golding v. Barlow*, Cowp. 24: *Field v. Carron*, 2 H. Bl. 27: *Gregory v. Elgin*, 2 C. & M. 336; 4 Tyr. 235; 2 Dowl. 259, S. C.; in which case the plaintiff had brought nearly 100 actions against publicans for penalties under the 25 Geo. 2, c. 16.

(*r*) *Morgan v. Evans*, 7 Moore, 344: *Day v. Smith*, 1 Dowl. 460.

(*s*) *Doyle v. Anderson*, 2 Dowl. 596,

where no assignee had been appointed.

(*t*) *Heaford v. M'Night*, 4 D. & R. 81: 2 B. & C. 579, S. C.: and see *Clapworthy v. Collier*, 2 C. & J. 631: *Doyle v. Anderson*, 2 Dowl. 596.

(*u*) *Andrews v. Marris*, 7 Dowl. 712.

(*v*) *Mylett v. Hawkins*, 5 Dowl. 647.

(*x*) *M'Connell v. Johnston*, 1 East, 431: *Cohen v. Bell*, Tidd, 9th ed. 469: *Minchin v. Hart*, 1 Chit. Rep. 215: *M'Cullock v. Robinson*, 2 New Rep. 352: *Anon.*, 2 Taunt. 61: *Snow v. Townsend*, 6 Id. 123: *Clapworthy v. Collier*, 2 C. & J. 631.

(*y*) *Webb v. Ward*, 7 T. R. 296: *Mason v. Polhill*, 2 Dowl. 61: 1 C. & M. 620; 3 Tyr. 595, S. C. In *Reynolds v. Holden*, Q. B.; Bail Court, M. T. 1837. *Cole-ridge, J.*, refused to compel the assignees to give security for costs where the defendant had not applied to them before the motion, to know whether or not they intended to continue the action or repudiate it. (1 Jurist, 945).

(*z*) *Taylor v. Montague*, 2 M. & W. 315: see *Doyle v. Anderson*, 2 Dowl. 596: *Beckham v. Knight*, 6 Dowl. 227.

tractu, where the plaintiff became bankrupt, and obtained his certificate, after action brought, and after issue joined, where the assignees had not interfered, nor intended to interfere, and where the defendant neglected to plead the bankruptcy, *puis dar. cont.*, as he might have done, the court refused to compel the plaintiff to give security for costs(*a*). And it seems that it will not be required in an action brought by the bankrupt to try the validity of the commission, even though he be abroad(*b*). Where a defendant obtains security for costs on the ground of the plaintiff's bankruptcy, and that the action is for the benefit of his assignees, he must undertake not to plead the bankruptcy(*c*).

If a plaintiff be convicted of felony, and under sentence of transportation, the court will stay the proceedings until he give security for costs(*d*). And where, after arresting the defendant, the plaintiff absconded to avoid a charge of bigamy, the court required him to give this security(*e*).

In Actions by Felons, &c.

Where another person is, in fact, proceeding with an action in the name of the party on the record, and that party is insolvent, the court will, by staying the proceedings, compel him, for whose benefit the action is proceeding, to come in and give security for costs(*f*). And the same if the action be brought at the instigation of a third party to try a right in which such third party is interested(*g*). Instances of this have already been given in the case of bankrupt and insolvent plaintiffs(*supra*). In another instance, where trespass was brought against parish officers for a distress for poor's rates, the court stayed proceedings in the cause until security for costs was given by the landlord of the plaintiff, who was also his attorney, and who had instigated him to refuse payment of the rates(*h*). But in a late case a somewhat similar motion was refused; it not being clearly made out by the affidavits that the action was the action of the third party, and not that of the plaintiff on the record(*i*). And although where all a debtor's property has been assigned to trustees for the benefit of his creditors, the court might compel the trustees to find security for costs in any action brought by them in the debtor's name; yet if merely part of his property be assigned, they will not require such security(*j*). And the Court of Common Pleas refused to require security for costs from the plaintiff in a case where it was sworn that he was insolvent, and that the action was brought in his name for the benefit of J. S., who was alone beneficially interested in the result(*k*). It may be here added, that, except in ejectment or where he is an officer of the court, the only mode of compelling a stranger to the record to pay costs is by an application to the court to

In Actions for Benefit of, or instigated by third Parties.

(a) *Beckham v. Knight*, 6 Dowl. 227; 4 Bing. N. C. 74, S. C.

(b) *M'Culloch v. Robinson*, 2 N. R. 352: see *Kennett v. Duff*, 2 Smith, 523; *Roper v. Phillips*, 3 M. & R. 84.

(c) *Manley v. Mayne*, 3 M. & R. 381: and see *Minchin v. Hart*, 1 Chit. Rep. 215.

(d) *Harvey v. Jacob*, 1 B. & Ald. 159.

(e) *Rogers v. Bangor*, 4 Dowl. 411: but see *Lloyd v. Davis*, 1 Tyr. 533.

(f) *Per Coleridge, J.*, in *Andrews v. Morris*, 7 Dowl. 712.

(g) See *per Tindal, C. J.*, in *Hearsey v. Pechell*, 7 Dowl. 437: and see *Tenant v. Brown*, 5 B. & C. 208.

(h) *Tenant v. Brown*, 5 B. & C. 208.

(i) *Hearsey v. Pechell*, 7 Dowl. 437; 5 Bing. N. C. 466.

(j) *Day v. Smith*, 1 Dowl. 460.

(k) *Morgan v. Evans*, 7 Moore, 344.

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stay proceedings until security for costs be given; for the court will not, except in those cases, order a stranger to the record to pay the costs of an action, although he be substantially a party to it (*l*).

Where Name
of third Party
used without
Consent.

Where a *cestui que trust* brings an action in the name of his trustee, or a wife in the name of her husband, or where one joint tenant or joint contractor uses the other's name in bringing a joint action, the court would probably, upon application of the trustee, or other joint tenant or joint contractor, stay the proceedings in the action, until the party bringing it should indemnify such trustee, &c., as to costs, in case of a nonsuit or verdict against him (*m*).

In other
Cases.

Where the defendant has possessed himself of all the plaintiff's property, so as to divest him of all power to give security for costs, the court will not require it (*n*).

Fresh Security.

If, after the security is given, one or both of the sureties become bankrupt or insolvent, that will afford no ground for the opposite party insisting on fresh security (*o*).

How and at
what Time
obtained, &c.

How and at what Time obtained, &c.] *The defendant had better apply to the plaintiff's attorney or agent for security for costs; and if it be refused, he may give two days' notice of the motion (p), and move the court accordingly on a proper affidavit (q).* Where the rule is intended to operate as a stay of proceedings a previous demand of security is necessary; and in a late case, where three days' notice were given to the plaintiff's attorney of a motion to *stay proceedings* until security for costs was given, it was held that such notice was not equivalent to a demand and refusal, and the rule was refused (*r*). If it be not intended, however, that the rule should be a *stay of proceedings*, but merely a rule upon the plaintiff requiring him to give security for costs, a previous application to the plaintiff's attorney will be unnecessary (*s*), as also the notice of motion. But if the previous application be not made, the costs of the rule will not be allowed to the defendant (*t*); and, according to a recent case, he may have to pay the plaintiff's costs of the motion (*u*); therefore, in all cases, it is best to make it. It has been held that the security must be given for retrospective, as well as prospective costs (*x*); but in a later case *Patteson, J.*, denied this (*y*). As the former case, however, was not cited, the point must be considered doubtful. *The defendant may also, instead of applying to the court, obtain a judge's order for the security for costs, on taking out a summons for that purpose.*

(*l*) *Hayward v. Gifford*, 6 Dowl. 699.

(*m*) *Ante*, 996.

(*n*) *M'Culloch v. Robinson*, 2 New Rep. 352; and see *Roper v. Phillips*, 3 M. & R. 84.

(*o*) *Jones v. Jacobs*, 2 Dowl. 61.

(*p*) See the forms, Chit. Forms, 592.

(*q*) *Hancock v. Smith*, 2 Chit. Rep. 150; Tidd, 9th ed. 537. See form of affidavit, Chit. Forms, 592; and of rule *nisi* thereon, *Id.* 593.

(*r*) *Huntley v. Bulwer*, 6 Dowl. 633.

(*s*) *Fountain v. Steele*, 5 Dowl. 331; *Baile v. De Bernales*, 1 B. & Ald. 331; *Hancock v. Smith*, 2 Chit. Rep. 150; *Jones*

v. Jones, 1 Dowl. 313; 2 C. & J. 207, S. C.; see *Bass v. Clive*, 3 M. & Sel. 283, *cont.* From the case of *Otho, King of Greece, v. Wright*, (6 Dowl. 12), it would seem that, if the defendant does not require a stay of proceedings, it is incumbent on the plaintiff to shew that the defendant has not applied to the former for security previous to obtaining the rule.

(*t*) *Rohrs v. Sessions*, 2 Dowl. 710.

(*u*) *Fletcher v. Lew*, 5 Nev. & M. 351; 3 Ad. & El. 551, S. C.

(*x*) *Harvey v. Jacob*, 1 B. & Ald. 159.

(*y*) *Oxenden v. Cowper*, 4 Dowl. 574.

By a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 98, CHAP. XII.
 "An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined" (z): When applied for.
 that is, unless the delay can satisfactorily be accounted for; as, if the defendant did not before then know the fact of the plaintiff's absence abroad (a), or the like. And in all cases the defendant must make his application promptly, after he knows of the plaintiff's being abroad (b), and before he takes any subsequent step in the cause; and he cannot in general move after plea pleaded, unless he states in his affidavit that he was not apprized of the plaintiff's being abroad at the time he pleaded (c). He may, however, so move, though he has obtained an order for time to plead (d); and especially if the plaintiff have been guilty of laches in declaring (e); and the defendant may so move, if he applies promptly, after the delivery of a materially amended declaration, although he has pleaded to the original declaration (f). And he may move even after an agreement, before issue joined, to take short notice of trial generally, and not for a specific day (g): but not, it seems, if he have agreed to take short notice of trial for a particular day (h). Previously to the 1 & 2 *V. c.* 110, (the act for abolishing arrest on mesne process), the defendant could not so move until after bail had been put in (i) and justified (k), unless the defendant were in custody; in which case, if the plaintiff did not give security for costs within a reasonable time after being ruled to do so, the court, upon application, would have discharged the defendant upon entering a common appearance (l). But now, as all actions are commenced by writ of summons, it would seem that the application may, in all cases, be made at any time after appearance, though the defendant be arrested and bail not put in. Also, if there were two or more defendants, and one of them put in bail, he might have required the plaintiff to give security for costs, without putting in bail for the others (m). And, while proceedings on the bail-bond were pending, the court would not require the plaintiff to give security for costs, although bail had been perfected since the assignment of the bond (n).

According to a recent decision in the Exchequer, the affidavit in support of the application need not, it seems, state in what stage the proceedings are: if the application be too Affidavit for.

(2) See *Ozenden v. Couper*, 4 Dowl. 574; *Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 573; *Young v. Rishworth*, 8 Ad. & El. 479, n. See the former practice, *Tidd's New Pract.* 269; *Walters v. Frythall*, 5 East, 338; *Adams v. Brown*, 1 Dowl. 273; 2 C. & J. 207, S. C.; *Kasten v. Plaw*, 1 Moo. & P. 30.

(a) *Duncan v. Stint*, 5 B. & Ald. 702; 1 D. & R. 348, S. C.; *Dax's Pract.* 141.

(b) *Anon.*, 2 Chit. Rep. 151: see *Young v. Rishworth*, 8 Ad. & El. 479, n.

(c) *Duncan v. Stint*, 5 B. & Ald. 702; 1 D. & R. 348, S. C.; *Brown v. Wright*, 1 Dowl. 95; *Wainwright v. Bland*, 2 C., M. & R. 740; 1 Gale, 333; 1 T. & G. 37, S. C.; see *Fletcher v. Lew*, 5 Nev. & M. 351; 3 Ad. & El. 551; 1 H. & W. 430, S. C. From which latter case it will be seen that the courts exercise a discretionary power to require security for costs,

notwithstanding defendant has proceeded in the cause after he knew the plaintiff resided abroad.

(d) *Wilson v. Minchin*, 2 C. & J. 87; 2 Tyr. 166; 1 Dowl. 299, S. C.; *Gurney v. Key*, 3 Dowl. 559.

(e) *Fry v. Wills*, 3 Dowl. 6.

(f) *Otho, King of Greece, v. Wright*, 6 Dowl. 12.

(g) *Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 573.

(h) *Montellano v. Garcias*, 1 Bing. 67, per *Patteson J.*: *Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 573.

(i) *De la Preuve v. Duc de Biron*, 4 T. R. 697; *Anon.*, 2 Chit. Rep. 152.

(k) *MS.*, M. 1814.

(l) *MS.*, T. 1820.

(m) *Carr v. Shaw*, 6 T. R. 496.

(n) *Bonnefor v. Russell*, 5 Dowl. 555.

BOOK IV.
PART I.

late, it is for the plaintiff to shew it in the affidavit, in shewing cause (o); but this seems questionable (p). When the affidavit proceeds upon the information and belief of the deponent, it should shew from what source his information is derived, and upon what his belief is founded (q).

Time for giving.

The court will not appoint any fixed time within which the security for costs shall be given by the plaintiff (r).

Amount and Sufficiency of.

The amount and sufficiency of the security is to be decided by one of the masters. It is no ground for increasing the amount of security fixed by the master, that the anticipated amount of costs will exceed that sum (s). Where the assignee of a debt brought an action in the name of the assignor, who was resident abroad, it was considered that the assignee's written undertaking for securing the costs was not sufficient (t).

Time for Pleading after.

As to the time for pleading after the security is given, and when judgment may be signed for want of a plea, see *ante*, Vol. I. 156.

Discharge of Security.

Discharge of Security.] Where a plaintiff has been compelled to give security for costs on account of his residence abroad, the court will not order the bond to be cancelled on an affidavit that he has returned to England, and is resident there (u).

(o) *Jones v. Jones*, 10 Law Journ. 77.

(p) See *Luzalletti v. Powell*, 1 Marsh. 376.

(q) *Bagley's Pract.* 237.

(r) *Broughton v. Jeremy*, 1 H. & W. 525.

(s) *Kent v. Poole*, 7 Dowl. 572.

(t) *Youde v. Youde*, 3 Ad. & El. 311.

(u) *Badnall v. Haley*, 7 Dowl. 19.

CHAPTER XIII.

OYER OF DEEDS, &c.

CHAP. XIII.

What and in what Cases.

What and in what Cases.] IN all cases where a deed, &c., is pleaded with a *profert*, either by the plaintiff or defendant, the other party may have oyer of it, (provided the *profert* have been necessary) (*a*), and may then set it forth in his plea, if he will. Unless there have been a *profert*, however, oyer cannot be prayed; and therefore, if a deed be pleaded without *profert*, the other party should demur specially for the want of it, particularly if it be essential to his plea, &c., that the deed should be set forth. In debt on bond conditioned to perform covenants in an indenture, the defendant cannot crave oyer of the indenture, the bond alone in such a case being pleaded with a *profert*; but he must himself set forth the indenture with a *profert*, if it be necessary to his plea, and the plaintiff may have oyer of it (*b*). Oyer is generally craved, where it is essentially necessary that the deed, &c., pleaded should be set forth, before the party craving oyer can plead. So, if any part of a deed which ought to be stated, be omitted in a declaration, &c., or if the deed be erroneously stated, the other party should set forth the deed upon oyer, and demur (*c*). It is usually craved of bonds and other specialties; sometimes of letters of administration (*d*); and it has been allowed of policies of insurance (*e*). It cannot, however, be craved of a deed operating under the Statute of Uses (*f*), nor of private acts of parliament (*g*), nor of letters patent or other records (*h*). If a record of the same court, however, be pleaded, we have seen (*ante*, 669) that the opposite party may demand a note in writing of the term and number of the roll on which such matter of record is entered or filed. It cannot be craved of mesne process (*i*); nor can it be craved of an original writ (*k*).

It may be observed that the term "oyer" does not import *inspection* of the deed; consequently, in cases where the party is desirous of such inspection, he must take out a summons, or apply to the court for that purpose, as mentioned *post*, 1023. In one case in debt on bond with a *profert*, the court refused to make a rule on the plaintiff to allow an inspection of it, on the ground that defendant suspected it to be forged (*l*); but they granted it in another (*m*).

Oyer does not include inspection.

(*a*) *Morris's case*, 2 Salk. 497; Steph. Pl. 69; but see *Cook v. Remington*, 6 Mod. 237. It seems that the demand of oyer is a kind of plea. (*Anon.*, 3 Salk. 119).

(*b*) 1 Saund. 8; *Cook v. Remington*, 2 Salk. 498; 6 Mod. 237, S. C.; 2 Saund. 405, n. (1); 409, n. (2).

(*c*) Hutt. 33; *Stibbs v. Clough*, 1 Str. 227; 1 Saund. 317, n. (2); 2 Id. 366 a.

(*d*) *Gerrard v. Early*, 2 Wils. 413.

(*e*) *Boissier v. London Assurance Company*, Hardw. 243.

(*f*) *Denman v. Bull*, 9 Moore, 593; 3 Bing. 499, S. C.; see *R. v. Jones*, 1 Jones Rep. Exch. Ir. 635.

(*g*) *Jeffery v. White*, 2 Doug. 477.

(*h*) *Rex v. Amery*, 1 T. R. 149.

(*i*) *Anon.*, Tidd, 126.

(*k*) *R. T.*, 19 G. 3: *Boats v. Edwards*, 1 Doug. 227.

(*l*) *Chetwind v. Marnell*, 1 B. & P. 271: and see *post*, 1024.

(*m*) *Anon.*, cited 8 Moore, 588.

BOOK IV.
PART I.Defendant
not bound to
plead without
it.Demand of,
when not de-
mandable.

The party craving oyer is not bound to plead without it in cases where it is properly demandable (*o*); and this though the deed be lost (*o*).

If it be craved where it is not demandable, the other party may treat the demand of oyer as a nullity, and sign judgment; but if, instead of doing so, he grant the oyer, the party who craved it may consider and treat the whole instrument as part of the other's plea (*p*).

At what Time
and how de-
mandable.

At what Time and how Demandable.] Before the introduction of the new practice, since the Uniformity of Process Act, oyer could not be demanded after the term in or of which the deed, &c., was pleaded (*q*), but it is conceived that this rule is now inapplicable. Oyer cannot be demanded after a plea in abatement (*r*). It must be also demanded before the time for pleading, or the time limited by a judge's order for pleading, has expired (*s*); or if made afterwards, it may be treated as a nullity (*t*). Where, however, the defendant after demand and refusal of oyer pleaded, in order to prevent judgment from being signed, it was held to be no waiver of right to oyer (*u*). And, under circumstances, the court have granted oyer, though sought for after the usual time allowed for it; and on an amendment it is frequently ordered that the defendant may have oyer of the deed or probate, &c.

Oyer, though upon the pleadings it seems, and is supposed to be, granted by the court, is in fact demanded and granted by the attornies (*x*). *The demand is made by a note in writing* (*y*).

When granted
and Time for
Pleading
after.

When granted, and Time for Pleading after.] The plaintiff is not bound to grant oyer within any limited time after it has been demanded (*z*). But it is generally his interest to grant it without delay; for the defendant, we have seen, (*Vol. I.* 155), is entitled to as many pleading days after the oyer has been given, as he had, yet unexpired, at the time of demanding it. But if the plaintiff demand oyer (*a*), the defendant must grant it within two days exclusive of that on which it is demanded; Sunday not being reckoned if it be the last of the two (*b*), otherwise the plaintiff may sign judgment as for want of a plea (*c*). The plaintiff has the same time to reply after oyer has been given, as he had at the time of the demand (*d*).

How granted.

How granted.] The demand of oyer, in the days of oral

(*o*) *Sorsby v. Sparrow*, 2 Str. 1186; 1 Wils. 16, S. C.; *Daley v. Mahon*, 6 Dowl. 395; 4 Bing. N. C. 335, S. C.; see *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789; 5 Dowl. 629, S. C.

(*p*) *Jeffery v. White*, 2 Doug. 476; *Longavil v. Hundred of Isleworth*, 6 Mod. 27; *Cook (Lady) v. Remington*, Id. 237; 1 Saund. 317, n. (2); see 3 T. R. 153, n.

(*q*) *Roberts v. Arthur*, 2 Salk. 497; 5 Com. Dig. 132, 133; 5 Co. 74, b; *Mayor of London v. Gorrey*, 2 Lev. 142; *Rex v. Amery*, 1 T. R. 149; Doct. Pl. 272; 22 H. 6, c. 30.

(*r*) *Longavil v. Hundred of Isleworth*, 6 Mod. 28; 2 Salk. 498, S. C.

(*s*) *Rex v. Amery*, 1 T. R. 150; *Gerrard v. Early*, 2 Wils. 413; *Duke of Leeds v.*

Fevers, Barnes, 268; *Farrance v. Brignall*, Id. 241; *Barber v. Satchwell*, Id. 326; *Hartley v. Varley*, Id. 329; Tidd, 9th ed. 586; Sellon, 288.

(*t*) *Barber v. Satchwell*, Barnes, 326; and see *Sparkes v. Simpson*, 2 B. & P. 379.

(*u*) *Goodricke v. Turley*, 4 Dowl. 431.

(*x*) *Anon.*, 3 Salk. 119; *Longavil v. The Hundred of Isleworth*, 6 Mod. 28; 2 Salk. 498, S. C.

(*y*) See form of demand, Chit. Forms, 594.

(*z*) *Webber v. Austin*, 8 T. R. 356.

(*a*) See form of demand, Chit. Forms, 594.

(*b*) *Page v. Divine*, 2 T. R. 40.

(*c*) *Anon.*, 6 Mod. 122.

(*d*) R. T., 5 & 6 G. 2.

pleading, was complied with by reading the instrument aloud in open court. The demand is now complied with by *exhibiting*, and, if required, (as is usually the case), *by making out a copy of the instrument*, (including the names of the witnesses by whom it was attested^(e)), *and delivering it to the opposite attorney* ^(f), who must pay for it at the rate of 4d. per sheet^(g). Where the plaintiff is an executor, and oyer is craved of the letters testamentary, of which profert is made, the will, as well as the letters testamentary, must be set out^(h).

CHAP. XIII.
In general.

If the deed, &c., be in the hands of a third person, the court, upon application, will by rule oblige him to give oyer of it, and produce it if necessary⁽ⁱ⁾; but they will not dispense with the oyer by substituting a copy of the original or otherwise^(k).

When in hands of third Party.

Refusal of Oyer.] To refuse oyer when it ought to be granted is error^(l). In order to bring error, the party insisting upon oyer must enter his prayer upon record; and this being in the nature of a plea, the other party may either counterplead, or demur to it, and the court will thereupon give judgment^(m); upon which judgment the writ of error may be brought. Error, however, does not lie for granting oyer where it is not demandable⁽ⁿ⁾. It may be added that the court cannot dispense with or modify the right to oyer^(o).

Refusal of Oyer.

Proceedings after Oyer.] After oyer is granted, it is optional with the party whether he set it forth in his plea or not^(p). If, however, he undertake to set it forth, and do not set forth the whole deed, or if he mis-recite it, the plaintiff may either sign judgment as for want of a plea^(q), or he may pray that the deed be enrolled, and thereupon have it truly enrolled, and demur^(r). But this must be understood as extending to cases only where the whole of the deed relates to the matter of action; for if it contain other matters besides those which are to be performed by the party craving oyer, it seems to be unnecessary to set out the irrelevant matter,—it is sufficient for him to set out verbatim the whole of the matters which relate to him^(s); otherwise, in some cases, the record might run to an immoderate length^(t).

Proceedings after Oyer.

If the declaration do not set out the deed accurately, and the defendant intend taking advantage of it on account of a variance, he should plead *non est factum*, without setting out

When Defendant should set out the Deed or not.

(e) *Longmore v. Rogers*, Willes, 288: and see *Cook v. Remington*, 6 Mod. 237; 2 Salk. 498, S. C.

(f) *Page v. Divine*, 2 T. R. 40.

(g) R. T., 5 & 6 G. 2.

(h) *Daley v. Mahon*, 6 Dowl. 395; 4 Bing. N. C. 235; 5 Scott, 606, S. C.

(i) *White v. Earl of Montgomery*, 2 Str. 1198; 1 Sellon, 262. If the deed be in the possession of a court, as in the case of an administration bond, the course may be to apply for a *mandamus* to compel the production. (See 3 Bing. N. C. 789).

(k) *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789; 5 Dowl. 627, S. C.

(l) *Longwill v. Hundred of Thistleworth*, 6 Mod. 128; *Soresby v. Sparrow*, 2 Str. 1186; 1 Wils. 16, S. C.

(m) *Mayor of London v. Gorrey*, 2 Lev. 142; *Longwill v. Hundred of Isleworth*, 2 Salk. 498; 2 Ld. Raym. 969, S. C.

(n) 1 Saund. 9 b; 2 Id. 46 b.

(o) *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789; 5 Dowl. 527, S. C.

(p) *Weavers' Company v. Forrest*, 2 Str. 1241.

(q) *Wallace v. Duchess of Cumberland*, 4 T. R. 370; *Cole v. Hulme*, 3 M. & R. 86, n.

(r) Com. Dig., Pleader, P. 1. And see *Wallace v. Duchess of Cumberland*, 4 T. R. 370, n.

(s) *Wallace v. Duchess of Cumberland*, 4 T. R. 370; 1 Saund. 317, n. (2).

(t) 1 Saund. 317, n. (2); and see 1 Saund. 9, 52; *Cook v. Remington*, 6 Mod. 237.

BOOK IV.
PART I.When Party
who grants
Oyer may set
out the Deed.

the deed on oyer, or the variance would not be available on such a plea after setting out the deed (*u*). But if the deed, as set out, do not support the breach assigned, then the mode of taking advantage of the defect is by craving oyer of, and setting out the deed, and demurring (*x*).

By *R. H.*, 2 *W.* 4, *r.* 44, "If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer-book may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing-officer" (*y*). If the plaintiff craving oyer of a deed, &c., do not afterwards set it forth in his replication &c., the defendant, in his rejoinder, &c., may (if he wish to have it set forth) pray that the deed be enrolled, and then set it forth, or at least such parts of it as relate to the matters in dispute (*z*).

(*u*) *Waugh v. Russell*, 5 Taunt. 707; 1 Marsh. 214, S. C.; and see *Wilson v. Woodfries*, 6 Moo. & Sc. 341; *Snell v. Snell*, 4 B. & C. 741; 7 D. & R. 249, S. C.; *Ross v. Parker*, 2 D. & R. 662; 1 B. & C. 358, S. C.

(*x*) *Anon.*, 3 Salk. 119; *Longavil v. Hundred of Isleworth*, 6 Mod. 27; *Jeffery v. White*, Doug. 476.

(*y*) Such was formerly the practice of the Common Pleas (Barnes, 327); but the practice of the Queen's Bench was different, in which court the defendant might either set forth the oyer in his plea or not, at his election. (*The Weavers' Company v. Forrest*, 2 Str. 1241; *Symmonds v. Parmenter*, 1 Wils. 97; Tidd, 9th ed. 569).
(*z*) Com. Dig., Pleader, P. 1.

CHAPTER XIV.

INSPECTION AND COPIES, &c., OF INSTRUMENTS.

CHAP. XIV.

In what Cases
Inspection of
Instruments
will be granted
to Defendant.

WHERE a *plaintiff* declares upon a written instrument not under seal, or where the action is *founded upon* such an instrument (*a*), the defendant may, in general, have a copy of it, by taking out a summons before a judge at chambers, who will thereupon make an order that a copy of the instrument in question be forthwith delivered to the defendant or his attorney, and that all proceedings in the action be stayed in the meantime (*b*). This is analogous to oyer of deeds &c. (*ante*, 1019). Also, in policy causes, a judge at chambers will make an order for the assured to produce to the underwriters, upon affidavit, all papers in his possession relative to the matters at issue (*c*). And in an action for general average the defendant is entitled to inspect the statement of the general average, but not the document from which it is drawn up (*d*). In other cases, the plaintiff has been even ordered to produce his books at the trial (*e*); and Lord *Mansfield* is said to have laid it down as a rule, that, whenever a defendant would be entitled to a discovery, he should have it here, without going into equity (*f*). The court or a judge, however, will not at present interfere to this extent (*g*), unless, perhaps, in insurance causes, as above mentioned, or there be some good reasons why inspection should not be granted; and therefore, in an action to try the title to land, the court refused a rule to compel the plaintiff, or his landlord, to permit the defendant to inspect or take a copy of one of the landlord's title deeds to the estate (*h*). But if it appear that a discovery is necessary to the defence, they will give the defendant a further time to plead, to enable him in the meantime to obtain the discovery by a bill in equity (*i*). Where only one part of an instrument exists, a party has no right to an inspection and copy, unless the person who has it in his hands holds it for the benefit of both, or can be considered as a trustee for the party seeking the copy (*k*). The court have refused to compel the plaintiff to give, or allow defendant to take, a copy of an agreement, to enable him to plead in abatement, that the agreement was signed jointly by

(a) *Charnock v. Lumley*, 5 Scott, 438.

(b) Tidd, 589, 591; Imp. B. R. 286: *Threlfall v. Webster*, 7 Moore, 559; 1 Bing. 161, S. C.: *Blogg v. Kent*, 6 Bing. 614; 4 Moo. & P. 433, S. C.: *Suister v. Coell*, 1 Sid. 386; *Whittaker v. Izod*, 2 Taunt. 114. The court will not always stay the proceedings. (*Charnock v. Lumley*, 5 Scott, 438).

(c) *Goldsmidt v. Maryatt*, 1 Camp. 562: 19 G. 2, c. 37, s. 6.

(d) *Tunzell v. Allen*, 7 Dowl. 496.

(e) *Goater v. Nunneley*, 2 Str. 1130: but see *Whitter v. Cazelet*, 2 T. R. 683.

(f) Tidd, 9th ed. 591.

(g) See *Whitter v. Cazelet*, 2 T. R. 683. *Hildyard v. Smith*, 1 Bing. 451; 8 Moore, 586, S. C.: *Threlfall v. Webster*, 7 Moore, 559; 1 Bing. 161, S. C.: *Ratcliffe v. Bleasby*, 3 Bing. 148; 10 Moore, 523, S. C.: *Cocks v. Nash*, 9 Bing. 723; 3 Moo. & Sc. 164, S. C.

(h) *Pickering v. Noyes*, 1 B. & C. 262; 2 D. & R. 386, S. C.: and see *Hildyard v. Smith*, 1 Bing. 451; 8 Moore, 586, S. C.

(i) *Whitter v. Cazelet*, 2 T. R. 683.

(k) *Per Vaughan, B., Neale v. Swind*, 2 C. & J. 279: see *Read v. Coleman*, 2 Dowl. 354; *Smith v. Winter*, 6 Dowl. 309.

himself and others (*l*). In an action for freight and demurrage by shipowners against the charterer, the Court of Common Pleas would not grant the latter an inspection of the log-book kept during the voyage, the defendant not stating the facts and reasons why he required it (*m*). In an action on an instrument, of which plaintiff is not bound to make proffer, the court will not compel him to grant an inspection of it on the ground that the defendant suspects it to have been forged (*n*), or on a forged stamp (*o*). In an action on a bill of exchange, the defence being that the defendant was liable only as surety, and that time had been given to the principal, the defendant was held not to be entitled to the inspection of a deed in the plaintiff's possession, by which, as it was alleged, time had been given to the principal, to which the defendant was not a party (*p*). And it seems that, in general, an inspection will not be granted, unless where the party applying is a party to the deed, or the other party holds it as his agent or trustee.

In what Cases
it will be
granted to
Plaintiff.

Also, where the *defendant* is possessed of any written instrument, of which it is material that the plaintiff should have inspection, a judge at chambers, under particular circumstances, will order that the plaintiff may have leave to inspect it; that the defendant shall give him a copy of it at his (the plaintiff's) expense; and that the defendant shall produce it at the trial, if called upon to do so (*q*); or that he shall produce it to the plaintiff's attorney, in order that he may ascertain the names of the witnesses so as to subpœna them (*r*). But in another case, the court said they would not compel the defendant to produce the deed at the trial (*s*). In a recent case, in an action against the marshal for an escape, the court compelled him or his officer to permit the plaintiff to inspect the writ of *habeas corpus* and return, and the *committitur* indorsed thereon (*t*). And in a later case, the assignee of a bankrupt was compelled to allow an inspection of the partnership books, in an action on a contract entered into with the bankrupt (*u*). In an action against a sworn broker of London for negligence in making a contract, the court, on motion, compelled him to produce his books, to enable the plaintiff to inspect and take a copy of the contract (*x*). But in an action for goods sold and delivered, the court would not compel a defendant to allow an inspection of the goods, to enable the plaintiff to give evidence of their identity (*y*). Nor would the court order inspection of a writ in the hands of the sheriff, in

(*l*) *Neale v. Bird*, 2 D. & R. 419.

(*m*) *Rundle v. Beaumont*, 1 Moo. & P. 396; 4 Bing. 537, S. C.

(*n*) See *Hilliard v. Smith*, 8 Moore, 586; 1 Bing. 451, S. C.; *Threlfall v. Webster*, 7 Moore, 559; 1 Bing. 161, S. C. And so, in the case of a deed of which proffer is made. (*Chetwind v. Marnell*, 1 B. & P. 271: *sed vide Anon.*, cited in 8 Moore, 586).

(*o*) *Chetwind v. Marnell*, 1 B. & P. 271.

(*p*) *Smith v. Winter*, 6 Dowl. 309.

(*q*) See *Morrow v. Saunders*, 1 B. & P. 318; 3 Moore, 671, S. C.; *Pickering v. Noyes*, 2 D. & R. 386; *Gracewood v. —*, Barnes, 439; *Blakey v. Porter*, 1 Taunt.

386; *Bateman v. Phillips*, 4 Id. 157, 161; *King v. King*, Id. 666.

(*r*) *Anon.*, 2 Chit. Rep. 230; 2 Camp. 95, n.

(*s*) *Doe v. Slight*, 1 Dowl. 163.

(*t*) *Fox v. Jones*, 7 B. & C. 732; M. & R. 570, S. C.: see *Cooper v. Jones*, 2 Moo. & Sc. 202.

(*u*) *Whitbourne v. Pettifer*, 4 Moo. & Sc. 182.

(*x*) *Browning v. Alwyn*, 7 B. & C. 204; but see *Rowe v. Howden*, 1 Moo. & P. 334; 4 Bing. 539, S. C.

(*y*) *Bell v. Taylor*, 6 D. & R. 388: see *Croft v. Peach*, 1 Hodg. 110.

order to enable the plaintiff to bring an action against him(*z*). The Court of Common Pleas have refused to a plaintiff in replevin, inspection of a deed in the avowant's possession, which conveyed to the avowant the reversion of the demised premises(*a*). In that court, where two parts of an indenture were executed by both parties, *each keeping one*, and one part was lost, the court would not compel the other party to produce his part, in order to support an action against him on the instrument(*b*). So where two parts of an agreement were interchangeably executed between landlord and tenant; in an action upon the agreement by a purchaser of the premises, the court refused to compel the tenant to produce his part to be stamped, unless such purchaser had applied to the vendor, or used every endeavour, without success, to find him(*c*). A new trial having been granted, the court allowed the plaintiff to have the inspection of a deed read in evidence by the defendant at the first trial, but not of a deed produced there but not read(*d*). Where a deed was taken from the plaintiff under a criminal warrant, the court ordered him to be supplied with a copy to declare upon(*e*).

In policy causes, where the plaintiff consents to enter into a consolidation rule, terms are generally imposed on the defendant to produce all books and papers material to the point in issue(*f*).

In Policy Causes.

Where a defendant makes an affidavit identifying a document exhibited to him only, and not filed, he will be compelled to allow the plaintiff to take a copy of that document, although it is sworn to contain a defence to the action(*g*).

Of Document referred to in Affidavit filed.

A party may, also, in general, on application to a judge, get an order on the opposite party to produce a deed before the commissioners of the stamp office to be stamped(*h*). And in a late case, where the defendant had surreptitiously obtained possession of an unstamped instrument executed by himself and the plaintiff, (thereby preventing the plaintiff from affixing a stamp, as he had intended, within twenty-one days after execution), and then swore that he had lost the agreement; the Court of Common Pleas ordered that he should produce a copy in his possession to the plaintiff; and that, if the plaintiff produced that copy stamped at the trial, the defendant should be precluded from producing the original(*i*). But the judge will not order the production where the instru-

Compelling Production for purpose of Stamping.

(*z*) *R. v. Sheriff of Chester*, 1 Chit. R. 476. The proper way of proceeding would be to rule the sheriff to return the writ.

(*a*) *Brown v. Rose*, 6 Taunt. 283; and see *Rex v. The Sheriff of Chester*, 1 Chit. Rep. 476; *Davies v. Brown*, 9 Moore, 178; *Radcliffe v. Bleasby*, 3 Bing. 148; 10 Moore, 523, S. C.; *Rundle v. Beaumont*, 4 Id. 537; 1 Moo. & P. 396, S. C.; *Cocks v. Nash*, 9 Bing. 723; 3 Moo. & Sc. 164, S. C.

(*b*) *Street v. Brown*, 6 Taunt. 302; 1 Marsh. 610, S. C.; *Woodcock v. Worthington*, 2 Y. & J. 4; *Lord Portmore v. Goring*, 4 Bing. 152; 12 Moore, 363, S. C.

(*c*) *Travis v. Collins*, 2 C. & J. 625.

(*d*) *Hewitt v. Piggott*, 7 Bing. 400; 5 Moo. & P. 252; 1 Dowl. 219, S. C.

(*e*) *Harris v. Adrit*, 2 Chit. 229.

(*f*) *Park. Ins.* 6th ed., Introduction, xliv.

(*g*) *Tebbutt v. Ambler*, 7 Dowl. 674.

(*h*) *Cooke v. Stocks*, Tidd, 9th ed. 487; *Bateman v. Phillips*, 4 Taunt. 157; *Gigner v. Bayley*, 5 Moore, 71; *Threlfall v. Webster*, 1 Bing. 161; 7 Moore, 559, S. C.; *Munn v. Godbold*, 3 Bing. 292; 11 Moore, 49, S. C.; *Neale v. Swynd*, 2 C. & J. 278; 1 Dowl. 314, S. C., and cases there cited in note.

(*i*) *Bousefield v. Godfrey*, 5 Bing. 418; 2 Moo. & P. 771, S. C. *Quarre*, as to the power of the court to restrain a party from taking an objection to evidence at *Nisi Prius*, i. e. the production of an existing instrument. (See *Travers v. Collins*, 2 C. & J. 625).

BOOK IV.
PART I.

Practical Proceedings for obtaining Inspection, &c.

How complied with.

Inspection of Books and Instruments of a Public Nature.

ment is between parties and persons not parties to the action, and where it might interfere with their rights or liabilities (j).

Before making the application, a demand of the copy or inspection should in general be made, and a refusal obtained. The application should be made to a judge at chambers, on summons. It should be supported (except in simple cases) by an affidavit (k), fully stating and explaining the facts and reasons upon which to ground the application (l). It is not, in general, necessary that the affidavit should disclose the nature of the action (m). It should, however, it seems, be shewn that an action is pending (n), and that the applicant has not a counterpart or copy of the instrument (o). The application might also be made to the court; but then, in general, the applicant would be ordered to pay the costs, or, at least, he would not get more costs than he would have done had the application been to a judge at chambers (p).

Under a judge's order to produce letters and give copies, the court have holden that it is sufficient to give extracts of such parts of letters as are relevant to the subject, if the party in whose possession they are will make affidavit that the residue of their contents does not relate to the subject (q).

In general, no order can be obtained for the inspection of instruments or books of a private nature, in the hands of a third person (r); but either of the parties to a suit has a right to inspect and take copies of books of a public nature, in which he has an interest, and which are material (s). As to the inspection of corporation books, and the books of public companies, see *Vol. I.* 224. And see *Corporation of Barnstaple v. Lathey*, 3 T. R. 303: *R. v. Babb*, Id. 579: *Imperial Gas Company v. Clarke*, 4 Moo. & P. 727; 7 Bing. 95, S. C.: *Mayor of Southampton v. Graves*, 8 Id. 590: *Mayor of Lynn v. Denton*, 1 Id. 689: 32 G. 3, c. 58, s. 4: *Schuldham v. Bunniss*, 1 Cowp. 192: *R. v. Purnell*, 1 W. Bl. 37; 1 Wils. 239, S. C. (University books): *R. v. Nottingham*, 1 W. Bl. 59: *R. v. Heydon*, Id. 351: *Hodges v. Atkiss*, 2 Id. 877; 3 Wils. 398, S. C.: *R. v. Hostman*, in *Newcastle-upon-Tyne*, 2 Str. 1223: *R. v. Cornelius*, Id. 1210: *Harrison v. Williams*, 3 B. & C. 162; 4 D. & R. 820, S. C.: *Daries v. Humphreys*, 3 Moo. & Sc. 223: *Stevens v. Berwick*, 4 Dowl. 277. As to the inspection of parish books, see *Anon.*, 2 Chit. Rep. 290: *May v. Gwinn*, 4 B. & Ad. 301: *R. v. Lee*, 1 Wils. 240: *Newall v. Simpkin*, 4 Moo. & P. 394; 6 Bing. 565, S. C.: *R. v. Great Farringdon*, 9 B. & C. 541: *Edwards v. Bennett*, 3 Moo. & P. 49; 6 Bing. 230; 3 Y. & J. 458, S. C.: *R. v. Justices of Buckinghamshire*, 8 B. & C. 375: and of other books and instruments, not strictly private, see *Crew v. Saunders*, 2 Str. 1005 (where the court refused inspection of the books of the

(j) *Lawrence v. Hooker*, 5 Bing. 6; 2 Moo. & P. 9, S. C.: *Taylor v. Osborne*, 4 Taunt. 159, n.

(k) See a form, Chit. Forms, 595.

(l) See *Rundle v. Beaumont*, 1 Moo. & P. 396.

(m) *Morrow v. Saunders*, 3 Moore, 871; 1 B. & B. 318, S. C.

(n) See *Ex parte Partridge*, 1 H. & W.

(o) *Morrow v. Saunders*, *ubi supra*.

(p) *Vaughan v. Frewent*, 2 Dowl. 299: *Read v. Coleman*, Id. 354.

(q) *Clifford v. Taylor*, 1 Taunt. 167: *Ramsbotham v. Cooper*, 2 Chit. Rep. 231.

(r) *Cocks v. Nash*, 3 Moo. & Sc. 166; 1 Ld. Raym. 705; 1 Chit. Rep. 476.

(s) 12 Vin. Ab. 104: 2 T. R. 284: *Bagley's Pract.* 242.

post-office): *Benson v. Port*, 1 Wils. 240 (where they refused it of the books of the Custom-house): *Herbert v. Ashburner*, 1 Wils. 297 (as to inspection of books of Sessions of the Peace): *Murray v. Thornhill*, Id. 717: *R. v. Worsenham*, 1 Ld. Raym. 705: *Cox v. Copping*, Id. 337; 5 Mod. 395, S. C.: *Allen v. Tap*, 2 W. Bl. 850: *Young v. Lynch*, 1 Id. 27 (as to charters of a chapter): *West v. Coll. of Phys.* 1 Wils. 240 (as to books of College of Physicians): *Rex v. Shelley*, 3 T. R. 141: *R. v. Lucas*, 10 East, 235: *R. v. Tower*, 4 M. & Sel. 162: *Warriner v. Giles*, 2 Str. 954: *Wilson v. Rogers*, Id. 1242: *Reg. v. Mead*, 2 Ld. Raym. 927: *R. v. Holland*, 4 T. R. 691 (as to reports of East India Company). And as to the inspection of court rolls, see *Vol. I.* 220: *Addington v. Clode*, 2 W. Bl. 1030: *Folkard v. Hemet*, Id. 1061: *R. v. Allgood*, 7 T. R. 746: *Rogers v. Jones*, 5 D. & R. 484. In an action for a malicious prosecution, when it appeared to be necessary, for the maintenance of the action, that the plaintiff should be put in possession of the contents of the examinations taken before the justices, and of the warrant on which he was apprehended, a rule was granted for their inspection, and that copies might be taken, and the originals produced at the trial(*t*). Any of the persons interested in copyhold property is entitled to inspect the rolls of the manor without the others joining in the application(*u*). By the late rule of *H. T.*, 2 *W.* 4, an order upon the lord of a manor to allow the usual limited inspection of the court rolls on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for, and been refused inspection. It is, however, but a rule *nisi* when no cause is pending(*x*). To obtain this inspection of public books, there must be a demand to inspect made on the proper officer, and a refusal. The demand cannot, it seems, be effectually made by the agent of a party authorized by warrant of attorney(*y*). The rule is obtained on motion grounded on affidavit, stating the circumstances. In general, the motion cannot be made until issue joined(*z*). Where there is no action pending, the motion is for a mandamus(*a*).

(*t*) MSS.: *Rex v. Smith*, 1 Str. 126; Barnes, 468: *sed vide Re Justices of Bedford*, 1 Chit. Rep. 627.

(*u*) *Ex p. Hutt*, 7 Dowl. 690.

(*x*) *Ex p. Best*, 3 Dowl. 38.

(*y*) See *Ex p. Hutt*, 7 Dowl. 690.

(*z*) *Hodges v. Atkis*, 2 W. Bl. 877; 3 Wils. 398, S. C.

(*a*) See *Rex v. Tower*, 4 M. & Sel. 62: *Ex p. Hutt*, 7 Dowl. 690.

CHAPTER XV.

PARTICULARS OF DEMAND, SET-OFF, &c.

BOOK IV.
PART I.

THE courts of common law have a general jurisdiction, independently of any statute, to order particulars of demand, or of defence, to be given, in order to prevent the necessity of applying to a court of equity(a). This jurisdiction is, in some cases, confirmed by statute. The rules by which the courts are governed in its exercise, the cases in which particulars will be required, their form, and their effect on other proceedings in the cause, may be conveniently discussed under the following heads, *viz.* :—

Particulars of Demand, 1028.

Particulars of Set-off, 1031.

Particulars of Payments, *id.*

Particulars of Objections to Patent, *id.*

Particulars of Demand, at what Time, and how obtained, and on what Terms, and Consequences of not giving them,

1032.

Particulars of Set-off, &c., how obtained, &c., 1033.

Form of Particulars, 1034.

Amendment of, id.

Time for Pleading after, 1035.

Annexing to the Record, *id.*

Effect of on the Pleadings and Evidence, 1036.

Particulars
of Demand
where there
are indebita-
tus Counts.

Particulars of Demand.] In cases where the declaration contains *indebitatus* counts, *R. T.*, 1 *IV.* 4, r. 6, orders, “that with every declaration, if delivered, or with the notice of declaration, if filed, containing counts of *indebitatus assumpsit*, or *debt on simple contract*, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios.” And, to secure the delivery of particulars in all such cases, it is further ordered, “that, if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant’s set-off,

(a) See the observations of *Tindal*, C. J., in *Bulnois v. M’Kenzie*, 4 Bing. N. C. 127.

shall be annexed by the plaintiff's attorney to every record at the time it is entered with the judge's marshal." This rule, it will be seen, is not imperative, and the only consequence of non-compliance with it is, that the plaintiff will not be allowed for his particulars in costs, if afterwards called for and delivered. Therefore, it would seem that the plaintiff might sign judgment within the usual time, though no particulars were delivered with the declaration (*b*). As to the consequence of not giving particulars, in pursuance of a judge's order, see *post*, 1033.

Where the declaration contains special counts:—It may be laid down as a general rule, that in all actions in which the plaintiff does not specify in his declaration the particulars of his cause of action, a judge, *upon a summons taken out for that purpose*, will make an order upon him to give the defendant the particulars in writing, and that all proceedings be stayed in the meantime. Thus, in debt on bond conditioned for the performance of covenants, or to indemnify, or the like, the defendant may call for a particular of the breaches for which he is sued (*c*). So, in covenant, for not repairing &c., the defendant may claim particulars of the non-repairs &c. (*d*). So, in an action by vendee against vendor, where it was stated in the declaration that the abstract of title delivered was "insufficient, defective, and objectionable," the court obliged the plaintiff to give a particular of all objections to the abstract, arising upon matters of fact, but not of objections in point of law (*e*). So, in an action by vendee to recover back his deposit, because the conditions of the sale had not been complied with, the defendant may have a particular of the matters of fact on which the plaintiff seeks to recover (*f*), though not of the legal grounds (*g*). So, in an action against a clerk by his former master, for enticing away plaintiff's customers, contrary to an agreement, the declaration, naming two of those customers, but also stating that there were divers others, without naming them, *Patteson, J.*, on an affidavit that the defendant would be prejudiced in his defence, and might be taken by surprise at the trial, unless the names of the other customers were given, made an order on plaintiff to give their names, and gave defendant time to plead after the delivery of the particulars (*h*). But wherever the particulars of the cause of action are fully specified in the declaration, as in actions on the case, special assumpsits, or the like, any further particulars would, of course, be unnecessary, and are seldom granted. And accordingly the court, in a recent case, refused to compel a plaintiff, suing for the breach of an agreement, and assigning that he had incurred certain expenses, to furnish particulars of such special damage (*i*). So, in an action on a bill of exchange, an order for particulars could not be granted

Where there
are special
Counts.

In Action ex
Contractu.

(*b*) *Jones v. Fowler*, 1 Gale, 256, *per Alderson, B.*, 4 Dowl. 232, S. C.

(*c*) Tidd, 9th ed. 597.

(*d*) But in an action of covenant by the assignee of a lease for non payment of rent and non repair, the court refused to compel the plaintiff to give particulars with sums and dates, particulars of the covenants alleged to have been broken having been given. (*Sowter v. Hitchcock*,

5 Dowl. 724).

(*e*) *Collett v. Thompson*, 3 B. & P. 246; *Robson v. Rowland*, 4 M. & W. 553.

(*f*) *Squire v. Todd*, 1 Camp. 293.

(*g*) *Robson v. Rowland*, 4 M. & W. 553.

(*h*) *Stapleton v. Dewey*, Q. B., 8th Dec. 1838, *coram Patteson, J.*, at chambers: see 11 Price, Rep. 19.

(*i*) *Retallick v. Hawkes*, 1 M. & W. 573.

BOOK IV.
PART I.In Actions ex
Delicto.

without some particular reason(*k*); though, perhaps, if the plaintiff in such a case volunteered to give, and gave particulars, and they were inexplicit, the court might order him to deliver further and better particulars(*l*).

In actions for torts, it is generally the practice to refuse particulars of demand, which in most cases are comprised in the declaration. But, under circumstances, a judge will, in such actions, compel a delivery of particulars, if there be an affidavit, stating, that the defendant does not know for what the plaintiff is proceeding(*m*). In an action against the marshal for an escape, a judge will, on application, compel a delivery of particulars of the escape for which the action is brought(*n*); and the plaintiff is bound to give a particular of the escape relied on, and the judge's order for a particular in such a case should order the precise day of the escape to be stated, if it be within the plaintiff's knowledge(*o*). In an action for malicious prosecution, alleging, as special damage, that divers persons, named in the declaration, had left off dealing with the plaintiff, *Coltman, J.*, on summons, ordered the plaintiff to give the addresses of the persons named within a week, or that, in default thereof, the names of those whose address was not given should be struck out of the declaration(*p*). In an indictment for a nuisance against members of a Gas Company, for throwing poisonous matter into the Thames, and sinking barges, and making erections in the river, the court ordered the prosecutor to give particulars of the nuisance intended to be proved; and *Littledale, J.*, observed, that in the case of an action, there could be no doubt upon the propriety of the plaintiffs being called upon to give such particulars(*q*). And in an indictment for a permanent nuisance by throwing mud into the river Thames, *Coleridge, J.*, ordered the prosecutor to give particulars of the acts of nuisance, but not of the dates(*r*). On the other hand, in an action against an attorney for negligence in transacting the assignment of a leasehold belonging to the plaintiff, *per quod* the plaintiff had to pay damages to the assignee, the Court of Common Pleas refused to compel a delivery of a particular of the plaintiff's demand, there being no ambiguity as to the cause of action, or the transaction in respect of which the action was brought(*s*).

In Ejectment.

In ejectment, if the defendant have any doubt as to the lands &c. for which the action is brought, he may oblige the plaintiff to give him a bill of particulars(*t*); or, where the ejectment is brought for a forfeiture, the court, upon application, will rule the lessor of the plaintiff to give the defendant a particular of the covenants and breaches &c. on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of anything not contained in those particulars(*u*).

(*k*) *Brooks v. Farlar*, 3 Bing. N. C. 291; 5 Dowl. 361, S. C.; see *Daves v. Anstruther*, 5 Dowl. 736; 2 M. & W. 817, S. C.

(*l*) *Daves v. Anstruther*, 5 Dowl. 736; 2 M. & W. 817, S. C.; post, 1034, 1035.

(*m*) *Snelling v. Channels*, 5 Dowl. 80.

(*n*) *Webster v. Jones*, 7 D. & R. 774.

(*o*) *Davis v. Chapman*, 1 Nev. & P. 699; 6 A. & E. 767, S. C.

(*p*) *Fell v. Rosling*, 6th April, 1839, at

chambers; see 4 B. & Ald. 93; 1 Y. & J. 257; Tidd, 533, 534.

(*q*) *Rex v. Curwood*, 5 Nev. & M. 369; see *R. v. Flower*, 7 Dowl. 665.

(*r*) *R. v. Flower*, 7 Dowl. 665.

(*s*) *Stannard v. Ullithorne*, 3 Bing. N. C. 326; 3 Scott, 771; 5 Dowl. 370, S. C.

(*t*) *Goodright v. Rich*, 7 T. R. 332, n.

(*u*) *Doe v. Birch*, 6 T. R. 587; ante, 754; see *Sowler v. Hitchcock*, 5 Dowl. 724.

Particulars of Set-Off.] Where the defendant pleads *set-off*, the plaintiff may obtain a particular of the set-off, in the same cases as a defendant would be entitled to it, if the matter so set off were declared upon; and if the defendant, in such a case, do not deliver a bill of particulars within the time limited in the judge's order for that purpose, he will not be allowed to give evidence of his set-off at the trial. It is no objection to the use of particulars of set-off, delivered without a judge's order, that they are headed in a different court from that, in which the action is brought (*x*). As to annexing the particulars of set-off to the *Nisi Prius* record on entering it with the marshal, see *post*, 1035.

CHAP. XV.
Particulars of
Set off.

Particulars of Payments.] Where the defendant pleads payment, the plaintiff, according to a decision of the Court of Common Pleas, may obtain particulars of the payments relied on, on an affidavit stating that he cannot safely go to trial without them (*y*).

Particulars of
Payments.

Particulars of Objections to Patent.] The act for amending the law of patents (5 & 6 W. 4, c. 83, s. 5) enacts, "that in any action brought against any person for infringing any letters patent, the defendant on pleading thereto shall give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant, respectively, to shew cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such judge shall seem fit." In the particulars delivered under this act, the substantial objections must be stated in distinct and intelligible language, and the particulars must not be confined to giving merely general information (*z*). And the court, or a judge on summons, has the power to order further and better particulars to be delivered, if the first be insufficient (*a*). In one case, where the defendant in his first notice alleged, that the invention was old, and had been used by J. H. M., and divers other persons, the Court of Common Pleas refused to order the names, addresses, and descriptions of such other persons to be given (*a*); but in a subsequent case, *Coltman, J.*, on the authority of a case decided by *Tindal, C. J.*, who had taken time to consider the question, ordered such particulars to be given, and that the words "and divers other persons" should be struck out (*b*).

Particulars of
Objections to
Patent.

If the defendant omit to deliver the particulars with his plea "on pleading," as required by the statute, the court, if they

Leave to
plead de novo
and deliver.

(*x*) *Lewis v. Hilton*, 5 Dowl. 267.

(*a*) *Bulnois v. M'Kenzie*, 4 Bing. N. C.

(*y*) *Ireland v. Thompson*, 4 Bing. N. C. 127; 6 Dowl. 215, S. C.

716.

(*b*) *Galloway v. Bleden*, at chambers, H. 1839.

(*z*) *Fisher v. Hewit*, 6 Dowl. 739.

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be satisfied on the merits, will grant him leave to plead *de novo*, and to deliver the objections with the fresh pleas (*d*).

As to the costs, in case of failure of any of these objections, see *post*, Chap. 31, title, "Costs."

Particulars of Demand, at what Time, and how obtained, &c.

Particulars of Demand, at what Time, and how Obtained, and on what Terms, and Consequences of not giving them.] We have already seen, that, in declarations containing *indebitatus* counts in *assumpsit*, or debt on simple contract, the plaintiff should deliver the particulars of the demand under those counts at the time of filing or delivering the declaration. Should he neglect to do so, under such a declaration, and in other cases where you are entitled to the particulars, the mode of obtaining them is, *by taking out a judge's summons for that purpose, and obtaining an order thereon*. By *R. H.*, 2 *W.* 4, r. 47, "A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the judge thinks fit, without the production of any affidavit (*e*), or after declaration and before plea pleaded." It is, indeed, discretionary with the judge to make an order at any time before the trial (*f*). *If good cause be not shewn against it, at the time specified in the summons, the judge will make an order that the plaintiff's attorney or agent shall deliver to the defendant's attorney or agent the particulars required, and that in the meantime all further proceedings in the cause be stayed (g)*. Even although the defendant may have had a particular delivered to him, still the judge may make plaintiff re-deliver it as a particular of demand in the action, though in such a case the defendant is usually ordered in any event to pay the costs of such particular, and, if necessary, to take short notice of trial (*h*).

On what Terms.

The term of "pleading issuably" will, in general, be imposed on the defendant by the order; unless expressly waived in writing by the plaintiff's attorney (*R. H.*, 59 *G.* 3); or unless the justice of the case requires a dispensation with such term; as, if the defendant be desirous of pleading in abatement a nonjoinder of a party, which is not regarded as other dilatory pleas; or unless, as it seems, in cases where the application for particulars has been rendered necessary by the neglect of plaintiff to deliver them with his declaration, in pursuance of the *R. H.*, 2 *W.* 4, r. 47.

Where Particulars delivered before Action.

In cases where a particular has been delivered before action, the judge, as we have just seen, usually orders the defendant to pay the costs of the fresh particulars, and requires him to take short notice of trial. Sometimes the judge will impose other terms on the defendant.

Consequences of not giving Particulars of Demand when ordered.

The consequences of not giving particulars of demand where the declaration contains *indebitatus* counts, have been already considered (*ante*, 1029). As regards the not giving

(*d*) *Losh v. Hay*, Exch., H. T. 1838, 2 Jurist, 157.

(*e*) 1 Chit. Rep. 724; and *R. T.*, 2 *G.* 4, C. P.; 6 Moore, 211. Before the rule of H. T., 2 *W.* 4, r. 47, it was necessary in the Exchequer to have an affidavit that the defendant never had had any particulars, or had mislaid them, or was not suffi-

ciently acquainted with the demand so as safely to proceed to trial. (2 C. & J. 253, n.; Tidd's New Pract. 302. See form of summons, Chit. Forms, 597).

(*f*) See Imp. K. B. 239.

(*g*) See forms, Chit. Forms, 597, 598.

(*h*) See *James v. Child*, 2 C. & J. 252; 2 Tyr. 312; 1 Dowl. 310, S. C.

particulars, in obedience to the usual order of a judge for them, the only consequence is, that when the order has been drawn up and served, it operates as a stay of proceedings from the time of such service till the particulars have been delivered(*i*). Under the usual order, the defendant cannot sign judgment of *nonpros*, though the plaintiff neglect or refuse the delivery of the particulars; neither will the court give him liberty to sign such judgment(*k*); and this, although the order direct the particulars to be delivered in a specified time(*l*). The defendant's course, in such cases, is, to obtain a further order, compelling the plaintiff to deliver them in a specified time, and expressly reserving to defendant the liberty of signing judgment of *nonpros*, if not delivered within it. But even this has been refused, where the order was made before declaration, and consequently the cause would be out of court in a year, unless the plaintiff declared(*m*). And the Court of Exchequer, in a late case, refused a rule to compel the plaintiff to deliver particulars in pursuance of a judge's order, and *Alderson, B.*, said, "If the plaintiff does not choose to obey the order by delivering further and better particulars, he cannot proceed with his cause, and is kept at arm's-length, as it were, until he thinks proper to do so: but he cannot be compelled in this manner to comply with the order"(*n*). Neglect to deliver particulars of demand is no ground for discharging the defendant out of custody(*o*). And where (before the 1 & 2 *V. c.* 110) an order for particulars was obtained in an action commenced by writ of summons, and the plaintiff, instead of delivering particulars, arrested the defendant in a new action for the same cause, *Taunton, J.*, held that the arrest was regular(*p*).

Particulars of Set-off, &c., how obtained, &c.] A particular of the defendant's set-off is obtained by taking out a judge's summons for that purpose, and getting an order thereon. It is also the practice, where a defendant obtains an order for time to plead, and it is contemplated that the defendant will plead a set-off, for the judge to impose in it the terms of the defendant's delivering a particular of set-off at the time of delivering the plea. The order generally requires the particulars to be delivered within a certain time, otherwise that the defendant shall not be allowed to give evidence of them at the trial(*q*). If the defendant neglect to give the particulars within the time thus required, he will not be allowed to avail himself of his set-off at the trial. Where an order was obtained for the delivery of particulars of set-off within a fortnight, and they were not delivered for five weeks, but after delivery an order was made by consent for the amendment of the declaration, this was holden to be a waiver of the irregularity, in the delivery of the particulars(*r*). The demand of particulars of set-off, de-

(*i*) *St. Hanlaire v. Byam*, 4 B. & C. 1055.

970: *Glover v. Watmore*, 5 B. & C. 769; 8 D. & R. 607, S. C.: *Wilson v. Hunt*, 1 Chit. Rep. 647.

(*k*) *Burgess v. Swayne*, 7 B. & C. 485: *Somers v. King*, 7 D. & R. 125.

(*l*) *Sutton v. Clarke*, 8 Bing. 165; 1 Moo. & Scott, 271; 1 Dowl. 259, S. C.: see *Dumday v. Hughes*, 2 Scott, 377: *post*,

(*m*) *Kirby v. Snowden*, 4 Dowl. 191.

(*n*) *Cane v. Spinks*, 7 Dowl. 27.

(*o*) *Gratt v. Willis*, 5 Dowl. 715.

(*p*) *Anon.*, 1 Dowl. 59.

(*q*) See *Lovelock v. Cheveley*, Holt, 552. See form of order, Chit. Forms. 557.

(*r*) *Wallis v. Anderson*, 1 Moody & M. 291, *per Lord Tenterden, C. J.*

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livered after a plea which was a nullity, has been holden to be no waiver of the plaintiff's right to sign judgment(s).

Particulars of payment, or other defences, may be obtained in the same way, on an affidavit stating that the plaintiff cannot safely go to trial without them (*ante* 1031).

Form of
Particulars.

Form of Particulars.] The particulars of demand, if delivered at the time of filing or delivering a declaration under the common *indebitatus* counts in *assumpsit*, or debt on simple contract, should be a *full particular* of the claim under those counts; and, if possible, should be comprised *within three folios*; but, if the full particulars cannot be comprised within three folios, then the plaintiff should deliver *such a statement of the nature of his claim*, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios, otherwise the plaintiff would not be allowed the costs of the excess of the three folios(*t*).

They must be
explicit.

The particulars must be explicit, and should in general specify items, dates, and amounts. Delivering a particular as general as the declaration would probably be deemed a contempt of the order, and might subject the attorney to costs(*u*). But the particulars need only be certain to a common intent(*x*). Where the acceptor of two bills of exchange for 250*l.* each, was arrested upon a *capias* indorsed thus: "Bail, by affidavit, for 250*l.* and upwards," "The plaintiff claims 266*l.* with interest thereon, from the 30th of December to the day of payment, for debt, and 3*l.* 10*s.* for costs &c.:" the declaration was upon two bills, and the particulars stated that the action was brought to recover 500*l.*: it was held that the defendant was entitled to better particulars(*v*). There is no objection, when an account has been already delivered, to refer to it generally in the particulars, without restating the items of it(*z*). And less particularity is required in a particular, delivered in pursuance of the above rule of *T. T.* 1831, where a full particular cannot be comprised in three folios(*a*).

Need not state
Credit Side of
Account.

It was formerly held, that, if money have been paid on account, the particulars should specify it, and state the balance which the plaintiff seeks to recover(*b*), and that stating the debtor side of the account only would be considered a contempt, for which the attorney might be ordered to pay the costs of both parties(*c*); but these decisions have been, it seems, overruled, and the court will not, *in general*, compel the plaintiff to give any part of the credit side of the account(*d*).

The particulars, when made out, should be delivered to the opposite attorney or agent.

Amendment
of.

Amendment of.] If the particulars be incorrect, the party who delivered them may have leave to amend them(*e*); or, if not

(s) *Ford v. Bernard*, 6 Bing. 534; 4 Moo. & P. 302, S. C.

(t) *R. T.*, 1 W. 4, r. 6, *ante*, 1028; and see the form of particulars, Chit. Forms, 598 to 600.

(u) See *Brown v. Watts*, 1 Taunt. 353.

(x) *Lines v. Rees*, 1 Jurist, 593.

(y) *Dawes v. Anstruther*, 3 Dowl. 736; 2 M. & W. 817, S. C.

(z) *Hatchett v. Marshal*, Peake, 172; 1 Wightw. 78.

(a) See the forms, Chit. Forms, 598 to 600.

(b) *Mitchell v. Wright*, 1 Esp. 280; see *Müller v. Johnson*, 2 Esp. 602.

(c) *Addington v. Appleton*, 2 Camp. 410.

(d) *Penprase v. Crease*, 4 Dowl. 711; 1 M. & W. 36, S. C.; *Randall v. Ikey*, 4 Dowl. 682; per *Patteson, J.*, in *Smith v. Eldridge*, 4 Ad. & El. 64; 5 Nev. & M. 408, S. C.

(e) See *Staples v. Holdsworth*, 6 Dowl. 714.

sufficiently explicit, the other party may take out a summons and obtain an order for *better particulars* (*f*). Where the plaintiff's attorney, by mistake, gave credit to the defendant in the particulars for a sum of money, the court allowed the plaintiff to amend them by striking out the credit so given (*g*). The delivery of a second or further particular, in order to cover a defect in the first particulars, will not avail the party delivering them, unless delivered under an order (*h*), except the objection be a technical one, and the opposite party waive it by accepting the second particulars (*i*). By a rule in the Queen's Bench no summons for further particulars shall be granted, unless the last previous order for particulars be first drawn up, and such order produced at the time of applying for such summons (*j*).

As to what errors in particulars are material, see *post*, 1037.

Time for Pleading after.] By *R. II.*, 2 *W.* 4, r. 1, s. 48, "A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge" (*k*). Where an order for particulars and an order for time to plead have been obtained, the time for pleading will run on, although no particulars are given, unless it is expressed, in the order for time to plead, that it is not to begin to run until after the delivery of the particulars (*l*). As to what plea the defendant may plead if bound to plead issuably, which he is in general bound to do by the order for particulars, see *ante*, *Vol. I.* 162. When a summons for particulars is discharged, it seems that the defendant ought to be prepared to plead *instantly*, unless where a delay has been occasioned by the plaintiff. (See *Vol. I.* 155).

· CHAP. XV.

When and how obtained or compelled.

Time for Pleading after

Annexing Particulars to the Record.] At the time of entering the *nisi prius* record with the judge's marshal, the plaintiff's attorney should annex to it a copy of the particulars of the demand, and of the defendant's set-off (if any) (*m*). This will save the necessity of the opposite party's proving the order for the delivery of the particulars, in cases where he may be desirous of confining the party delivering the particulars to the proof of the items contained therein (*n*). If the plaintiff annex to the record particulars varying from those delivered to the defendant, and the defendant is prepared at the trial to prove the delivery of the particulars to him, the defendant may nonsuit the plaintiff, if he is unable to give in evidence any cause of action included in the particulars

Annexing Particulars to the Record.

(*f*) *Tidd*, 589, 599; see *Hurst v. Watkins*, 1 Camp. 69, n.; *Millwood v. Waller*, 2 Taunt. 224; *Brown v. Hodgson*, 4 Taunt. 189; *Hunter v. Welsh*, 1 Stark. 224.

(*g*) *Preston v. Whiteheart*, 5 Dowl. 720.

(*h*) *Brown v. Watts*, 1 Taunt. 353.

(*i*) *Jones v. Fowler*, 4 Dowl. 232.

(*j*) *R. H.*, 59 G. 3, Q. B.

(*k*) See *ante*, Vol. I., 155; *Mowbray v. Scuberth*, 3 East, 508; see *Adams v. Drum-*

mond, 1 Dowl. 99.

(*l*) *Adams v. Drummond*, 1 Dowl. 99; see *Aspinall v. Smith*, 8 Taunt. 592; *Lane v. Parsons*, 3 Bing. N. C. 264; 5 Dowl. 359, S. C.

(*m*) *R. T.*, 1 *W.* 4, r. 6, *ante*, 1028; and Vol. I. 258.

(*n*) *Macarthy v. Smith*, 8 Bing. 146; 1 Moo. & Scott, 227; 1 Dowl. 253, S. C.

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delivered; or if not prepared with proof of the delivery of the particulars, the defendant will be entitled to a new trial, and the plaintiff's attorney might be made to pay the costs of the former trial (o).

Effect of Particulars on the Pleadings and Evidence.

Payments specifically admitted in, need not be pleaded.

Effect of Particulars on the Pleadings and Evidence.] The particulars are not to be considered as incorporated in the declaration (p); and before the *R. T.* 1838, it was ruled, that an admission in a particular of demand of money received would not avail defendant in an action of debt, without a plea of payment, though it might be otherwise in an action of *assumpsit* (q). This point, however, was not free from doubt (r); and it is now settled otherwise by the *R. T.*, 1 *Vict.*, which orders, that in any case, in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply to causes where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. And by the same rule it is ordered, that payment shall not, in any case, be allowed to be given in evidence, in reduction of damages, but shall be pleaded in bar.

Proof confined by the Particulars.

At the trial, the party who delivered the particulars will be confined in his proof to the items therein contained. Thus, where the particulars stated the plaintiff's demand to be for goods sold and delivered to the defendant, the plaintiff was not allowed at the trial to give evidence of goods sold *by* the defendant as agent for the plaintiff (s). So, proof that the defendant acknowledged that he owed the plaintiff 13*l.* 10*s.* will not support particulars, "To a beast sold and delivered, 13*l.* 10*s.*" (t). So, where the particular was of a promissory note only, and when the note was produced at the trial it was found to be written on an improper stamp, the court held, that the plaintiff was precluded from resorting to recover upon the consideration for the note (u); but, under such a particular, after proving the note at the trial, the plaintiff may recover interest on it (x). Where the declaration contained three counts on three bills of exchange, but the particulars stated only that the action was brought to recover the money due on the bill in the first count, it was considered that the plaintiff could not recover on the bills mentioned in the second and third counts (y). But where the declaration contained two counts, each on a bill of exchange, and the particulars stated the action to be brought to recover the amount of the bill

(o) *Morgan v. Harris*, 1 Dowl. 570; 2 C. & J. 461, S. C.

(p) *Booth v. Howard*, 5 Dowl. 438.

(q) *Ernest v. Browne*, 3 Bing. N. C. 674; *Coates v. Stevens*, 2 C., M. & R. 118: see *Jacobs v. Shirley*, 2 Bing. 88.

(r) *Kenyon v. Wakes*, 2 M. & W. 764: *Nicholl v. Williams*, Id. 758; *Rymer v. Cook*, M. & M. 86, n.

(s) *Holland v. Hopkins*, 2 B. & P. 243; 3 Esp. 168, S. C.

(t) *Breckon v. Smith*, 1 Ad. & Ell. 488.

(u) *Wade v. Beasley*, 4 Esp. 7: *Brown v. Watts*, 1 Taunt. 353.

(x) *Blake v. Lawrence*, 4 Esp. 147.

(y) *Duncan v. Hill*, 2 B. & B. 684: but this decision, according to that of *Cooper v. Amos*, 2 C. & P. 267, (*post*, 1039), seems questionable; for, in general, if the matter in respect of which the plaintiff seeks to recover, and of which he gives evidence, be expressly stated in the declaration, the particulars need not mention it.

mentioned in the first count, with interest, and that the plaintiffs would rely on the whole or any part of the declaration for the recovery thereof, they were held sufficient to entitle the plaintiff to recover on the second count (z). It has been held, that, under a particular for goods sold and delivered, the plaintiff could not recover for money had and received, although it appeared that the goods had been delivered to the defendant as agent, for sale or return, and that he had sold them and received the value (a); this decision, however, appears questionable (b). Where the plaintiff's particular stated various sums of money due by the defendant, but some of which were, in fact, owing from the defendant and his partner, and not from the defendant alone, and the defendant pleaded the nonjoinder in abatement; the plaintiff was not allowed to give evidence of those due from the defendant solely, because they were not distinguished from the others in the bill of particulars (c). Where the plaintiff's bill of particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands, by the plaintiff and R., and won by the plaintiff of R., the court held that he could not recover the amount of his own stake, on proof that he had redemanded it from the defendant before it was paid over (d).

As the object, however, of this strictness is, that the opposite party may know what will be attempted to be proved against him at the trial, and may prepare his evidence accordingly, a mistake in the particular, not calculated to deceive or mislead him, will not be deemed material (e). Thus, an error in the date of one of the items in a bill of particulars, as, where work and labour was stated to have been performed in another month, was holden to be immaterial, because it could not have misled the defendant (f). And, in a more recent case, where the particulars stated goods to have been delivered on the 6th June, 1836, and the plaintiff gave evidence of goods supplied on the 28th May, 1836, it was held that this was not a particular which could have misled the defendant, although he had bought goods of the plaintiff, and paid for them for the six months previous to the 28th May, 1836 (g). So, where the particular specified a bill for 60*l.*, bearing date on a certain day, and the evidence was of a bill for 63*l.*, dated on a different day, in the same year and month, *Abbott, J.*, held the variance to be immaterial (h). So, where a payment made on account of the defendant to A. was stated in the particulars to have been made to B., Lord *Ellenborough* said, he should hold it to be immaterial, unless the defendant would make affidavit that he was misled by the particulars (i). So, in an action for work and labour, where the particulars stated that plaintiff claimed for work and labour under an agreement,

Mistakes, not misleading, immaterial.

(z) *Hay v. Fisher*, 2 M. & W. 722.

(a) *Macarthy v. Smith*, 8 Bing. 145; 1 Moo. & Scott, 227, S. C.

(b) See *Lambirth v. Roff*, 8 Bing. 411; 1 Moo. & Sc. 597, S. C.

(c) *Colson v. Selby*, 1 Esp. 452; 2 Selton, 339, S. C.

(d) *Davenport v. Davies*, 1 M. & W. 570.

(e) *Lambirth v. Roff*, 1 Moo. & Scott, 597; 8 Bing. 411, S. C.: *Harrison v. Wood*, 1 Moo. & Scott, 536; 8 Bing. 371,

S. C.

(f) *Milkwood v. Walter*, 2 Taunt. 224; *Harrison v. Wood*, 1 Moo. & Scott, 536; 8 Bing. 371, S. C.: *Lambirth v. Roff*, 1 Moo. & Scott, 597; 8 Bing. 411, S. C.: *Spencer v. Bates*, 1 Gale, 108; *Green v. Clarke*, 2 Dowl. 18.

(g) *Fleming v. Crisp*, 5 Dowl. 454.

(h) *Manning's Index*, 240.

(i) *Day v. Bower*, 1 Camp. 69, n: see *Lambirth v. Roff*, 1 Moo. & Scott, 597; 8 Bing. 411, S. C.

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it was held that he might recover for *extras* (*k*). So, where the action is for money had and received to the use of the bankrupt, and the particulars for money had and received to the use of the plaintiffs, as assignees (*l*). So, in an action against an agent for not accounting for goods delivered to him by the plaintiff to be sold, and for goods sold, and money had and received, and the particulars were headed, "A. to B. — tierces of porter, &c., £ —," and contained also items for money had and received, they were held to be applicable to any of the counts in the declaration (*m*). So, in an action by a carrier, who had mis-delivered certain goods to the defendant, which the latter appropriated to his own use, the carrier having paid the amount of the goods to the real owner, it was held that he might recover on the count for money paid, although his particulars were only "To seventeen firkins of butter, 55*l*. 6*s*." (*n*). So, in an action for goods sold, where the particulars were for "chalk," and the proof was for "caulk," the variance was held immaterial, as it was not likely to mislead (*o*). Disbursements have been held recoverable under an item in the particulars for "cash advanced" (*p*). So, where, in debt for rent, the plaintiff in his particular described the premises as being in a different parish from that in which they were really situate, the court held the mistake to be immaterial, as the defendant could not have been misled by it (*q*). So, in ejectment to recover premises forfeited by non-payment of rent, a variance between the amount of rent proved to be due, and the amount demanded in the particulars, was holden not to be material (*r*). Where the particulars of the plaintiff's demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of a promissory note stamp, it was held, that the account stated might be proved by other evidence than the memorandum. It was held, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it (*s*).

Also, although the plaintiff is confined in his proof to the items contained in his bill of particulars, yet if it appear from the defendant's evidence, that he is entitled to recover for items not included in the bill, he shall recover for such items (*t*). But where, in an action for lottery tickets sold, the particulars of the defendant's set-off mentioned the sale of the tickets to himself, it was held that this was not sufficient proof of the sale, and that the fact must be proved by other evidence (*u*).

mission.
when cured
by Defen-
dant's Evi-
dence.

(*k*) *Lines v. Rees*, 1 Jurist, 593.

(*l*) *Tucker v. Barrow*, 1 M. & M. 137.

(*m*) *Hunter v. Welsh*, 1 Stark. 224: *sed vide Macarthy v. Smith*, 8 Bing. 145; 1 Moo. & Scott, 227, S. C.

(*n*) *Brown v. Hodgson*, 4 Taunt. 189; *sed vide Macarthy v. Smith*, 1 Moo. & Scott, 227; 8 Bing. 145, S. C.: *Breckon v. Smith*, 1 Ad. & Ell. 480: *ante*, 1036.

(*o*) *Spencer v. Bates*, 1 Gale, 108.

(*p*) *Harrison v. Wood*, 1 Moo. & Scott, 536; 8 Bing. 371, S. C.

(*q*) *Davies v. Edwards*, 3 M. & Sel. 380:

and see *Lambirth v. Roff*, 8 Bing. 411; 1 Moo. & Scott, 597, S. C.

(*r*) *Tenny v. Moody*, 10 Moore, 252; 3 Bing. 3, S. C.

(*s*) *Singleton v. Barrett*, 2 C. & J. 368.

(*t*) *Hurst v. Watkis*, 1 Camp. 68: accord *per Parke, B.*, in 1 M. & W. 486: see 1 Phil. Evid. 182: Rosc. 39: *Holland v. Hopkins*, 2 B. & P. 243.

(*u*) *Miller v. Johnson*, 2 Esp. 602: *Harrington v. M^r Morris*, 5 Taunt. 229: *sed quare?*

It seems also, that where the particulars need not be given as to some counts, the omission in them of those causes of action will not be material. Therefore the delivery of a particular under the *indebitatus* counts will not prevent the plaintiff from giving evidence on a special count in his declaration, if he has not included that part of his claim in his particulars, as a particular is only necessary to explain the *indebitatus* counts (*y*). And, where the first count was on a bill of exchange for 40*l.*, and the second on a bill for 20*l.*, and the third for goods sold, and the particulars specified only the 20*l.* bill and the goods—*per Abbot, C. J.*, “That is no objection. If the bill is specified in the declaration, it need not be mentioned in the particulars. You must give a particular of goods sold, but you never need give a particular of bills of exchange if they appear in the declaration” (*z*). But where the plaintiff declared upon three bills of exchange; but sought by his particular to recover on the bill set out in the first count only, it was holden that he might give the other two bills in evidence to prove a collateral matter, namely, the partnership of the defendants (*a*); but it was considered that he could not give them in evidence as a substantive cause of action (*a*). Though, according to a more recent case, he might have done so, had the particulars stated that the plaintiff would rely on the whole or any part of the declaration (*b*).

CHAP. XV.
Special
Counts not
affected by.

The plaintiff may give evidence of a demand contained in the particulars, though he omitted to include it in a bill delivered before action brought (*c*). But this would in most cases operate against him in evidence as to the additional items; and the delivery of a former bill is conclusive evidence against an increase of charge on any of the same items contained in a subsequent bill (*d*).

Proof of
Items omitted
from former
Bill.

No proof of the order for, or delivery of, the particulars of demand or set-off is requisite at the trial, when they have been annexed to the record (*e*); but the particulars are not part of the record (*f*). When not so annexed, in order to prove them at the trial, the judge's order, with the particulars, should be produced, and evidence given of the plaintiff's, attorney's, or agent's signature to the latter, unless admitted by him (*g*).

Particulars,
how proved.

(*y*) *Day v. Davies*, 5 C. & P. 340: and see *Cooper v. Amos*, 2 C. & P. 267: *Fisher v. Wainwright*, 5 Dowl. 102; 1 M. & W. 480, S. C.

(*z*) *Cooper v. Amos*, 2 C. & P. 267.

(*a*) *Duncan v. Hill*, 2 B. & B. 682.

(*b*) *Hay v. Fisher*, 2 M. & W. 722.

(*c*) *Short v. Edwards*, 1 Fsp. 374.

(*d*) See *Loveridge v. Botham*, 1 B. & P. 49.

(*e*) *Macarthy v. Smith*, 8 Bing. 145; 1 Dowl. 253, S. C.: *ante*, 1035.

(*f*) *Booth v. Howard*, 5 Dowl. 438.

(*g*) See *Rosc. 40*: 1 Phil. Evid. 183.

CHAPTER XVI.

COMPOUNDING PENAL ACTIONS.

CHAP. XVI.

Leave to compound, when granted.

IN all actions by common informers for penalties upon any statute, the court, upon application, may give the plaintiff leave to compound with the defendant (*a*). No composition can be made, unless by the order and consent of the court in which the suit is pending, under pain of 10*l.*, and of being ever afterwards disabled from suing in any popular action (*b*). This leave of the court, however, is not necessary in actions by the party grieved (*c*). It is entirely in the discretion of the court to grant it or not (*d*). And the court have refused to grant it in an action on the 25 *G. 2, c. 36*, for keeping a disorderly house, &c. (*e*); also in an action where part of the penalty was given to the poor (*f*).

The composition is made on the consent of the parties. It cannot take place before the defendant has pleaded (*g*). And the court will seldom allow of it after verdict, unless circumstances be stated to them which entitle the defendant to such an indulgence (*h*), as where he is very poor, &c. (*i*).

How obtained.

The motion for this purpose is grounded on an *affidavit by the plaintiff, or his attorney, stating shortly the substance of the declaration and plea and the state of the cause, and the sum for which the parties have agreed to compound the action (j)*. The defendant or his attorney should make an *affidavit to the same effect. Take these affidavits, with the declaration and plea, to the Solicitor of the Treasury, who will lay them before the Attorney-General for his consent. As soon as the Solicitor of the Treasury ascertains whether the Attorney-General consents to or refuses the composition, he generally writes to the plaintiff's attorney informing him of it. The plaintiff's attorney then applies at the Treasury, and if the Attorney-General consents, you have to pay the solicitor 5*l.* 1*s.* 4*d.*, who hands to you the papers left, and also a consent brief of the Attorney-General, consenting on the part of the crown to the action being compounded, and for one moiety of the penalty to be paid to the plaintiff, and the other moiety to remain for the crown. The*

(*a*) 18 *El. c. 5, ss. 3, 6.*

(*b*) *Ib.*: see *Rex v. Crisp*, 1 *B. & Ald.* 282; *Williams v. Edley*, 8 *East*, 378; *Howard v. Soverby*, 1 *Taunt.* 103; *Sheldon v. Mumford*, 5 *Id.* 268.

(*c*) *Kirkham v. Wheely*, 1 *Salk.* 30.

(*d*) *Maughan v. Walker*, 5 *T. R.* 98; *Howell v. Morris*, 1 *Wils.* 79, 130.

(*e*) *Bellis v. Beale, Tidd*, 9th ed. 557; *Wood v. Johnson*, 2 *W. Bla.* 1157.

(*f*) *Hunson v. Sprange*, 2 *Smith*, 195.

(*g*) 18 *El. c. 5, s. 3*: *R. v. Crisp*, 1 *B. & Ald.* 282; *R. v. Collier*, 2 *Dowl.* 581.

(*h*) *Crowder v. Wagstaff*, 1 *B. & P.* 18; *Maughan v. Walker*, 5 *T. R.* 98; *Morgan v. Lute*, 1 *Chit.* 381.

(*i*) *Bradshaw v. Mottram*, 1 *Str.* 167.

(*j*) Where the act gives costs to the prosecutor, he has been allowed to receive a certain sum and costs of suit, which together amounted to more than the sum paid to the crown. (*North v. Smart*, 1 *B. & P.* 51; *Wood v. Johnson*, 2 *W. Bla.* 1157). But this has been refused where the sum stipulated for costs was so disproportionate as to prove collusion (*Wood v. Cassian*, 2 *W. Bl.* 1157): and where the act does not give costs, and the defendant is willing to compound for a certain sum, and to give a further sum for costs, the crown is entitled to half of such further sum, it only being in the nature of an addition to the composition. (*Lee v. Cass*, 2 *Taunt.* 213).

plaintiff's attorney then indorses a brief for counsel to consent on the part of the plaintiff to the action being compounded. A like brief must be signed, indorsed by counsel, to consent on the part of the defendant. The two latter are half-guinea motions, and need not be moved in court. All this may be done in vacation as well as in term(k). Take the three briefs and affidavits to the Rule Office, and draw up the rule and serve a copy on defendant's attorney, and make an appointment with him for the defendant, to go with you to pay the money to the officer of the respective courts, whose duty it is to receive the money and give a receipt upon the original rule. The plaintiff's attorney then makes an appointment with his client to attend and receive the moiety, and he must accompany him to identify him.

Formerly, in the Common Pleas, where part of the penalty went to the crown, it was usual to give notice to the Solicitor of the Treasury, and the consent of one of the Queen's counsel or serjeants must have been obtained, before the motion could have been granted for leave to compound a penal action(l). But by general rule of all the courts of the *H. T.*, *W.* 4, r. 99, "Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall be given to the proper officer, but in other cases it may."

Notice to Solicitor of Treasury, when necessary.

The rule for the composition must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound(m); and, if he do not afterwards pay it, the court, upon application, will grant an attachment against him(n).

Payment of Composition, how enforced.

(k) The application, it seems, cannot be made to the judge at Nisi Prius on the trial of the cause. (*Lee v. Carey*, 1 Chit. Rep. 381).

Sheldon v. Mumford, 5 Taunt. 268: *Rex v. Gibbs*, 3 Dowl. 345.

(m) R. E., 33 G. 3, r. 2.

(n) *Rex v. Clifton*, 5 T. R. 257. See form of rule, Chit. Forms, 602.

(l) *Howard v. Sowerby*, 1 Taunt. 103:

CHAPTER XVII.

SETTING ASIDE PROCEEDINGS FOR IRREGULARITY, &c.

In what Cases, 1042.
How set Aside, 1044.
Notice of Motion and Stay of Pro-
ceedings, 1045.
In what Time the Application must
be made, and Waiver of,

1045.
Excuse for not applying in Time,
 1049.
Confessing Irregularity, id.
Costs, &c., 1050.

CHAP. XVII.

In what Cases.

In what Cases.] THE particular cases in which proceedings are usually set aside for irregularity have been already noticed in the course of this Work; we shall here, however, again notice some of them, and attempt to deduce from them a few general rules.

1. Where a previous necessary Proceeding has been omitted.

1. If any necessary proceedings have been omitted by the plaintiff, his next subsequent proceeding may be set aside for irregularity. Thus, if the defendant be arrested upon bailable process, and there have been no affidavit to hold to bail, the arrest will be set aside for irregularity; that is, the defendant will be discharged upon a common appearance; or, if he have given a bail-bond, such bail-bond will be ordered to be delivered up to be cancelled (*a*). So, if plaintiff sign judgment for want of a plea, without having given a rule to plead, or demanded a plea when necessary, the court or a judge will set aside the judgment (*b*). So, if the plaintiff proceed to trial without having given notice of trial to the defendant, the court will set aside the verdict (if for plaintiff) and grant a new trial (*c*). So, if the plaintiff sign judgment upon a *cognovit*, without entering an appearance for the defendant, the court or a judge will set aside the judgment (*d*). So, where a penal statute required an affidavit to be filed before suing out process, and several actions were commenced on an affidavit, including all the defendants in the several actions, instead of a separate affidavit against each, it was held, that the affidavit was defective, that the want of an affidavit was not waived by putting in bail, and all the proceedings were set aside (*e*). So, where judgment was signed in the Queen's Bench after verdict, and a certificate for speedy execution, without a rule for judgment being given, it was set aside (*f*).

2. Where the Proceeding is too soon or too late.

2. If any necessary proceeding on the part of the plaintiff be not had within the time limited for it, or be had before the time appointed for it by the practice of the court, it may be set aside for irregularity. For instance, if the plaintiff enter an appearance for the defendant after the time limited for that purpose, the court or a judge will set aside the proceedings for irregularity (*g*). And the same, if he declare

(*a*) See Vol. I. 500.

(*b*) See *ante*, Vol. I. 157, 158.

(*c*) See Bul. N. P. 327: *Douglas v. Ray*, 4 T. R. 552.

(*d*) See *Davis v. Hughes*, 7 T. R. 206: *Watson v. Dore*, 2 M. & W. 386: *Roberts v. Spur*, 3 Dowl. 551. Judgment signed without an appearance is a nullity, and

not waived by laches. (*Id.*: *ante*, 679).

(*e*) *Goodwin q. t. v. Parry*, 4 T. R. 577.

(*f*) *Governors of the Poor of Exeter v. Sivell*, 7 Dowl. 624.

(*g*) *Watson v. Dore*, 2 M. & W. 386: *Smith v. Painter*, 2 T. R. 719: see *Davis v. Hughes*, 7 Id. 206: *ante*, Vol. I. 122.

after the cause is out of court (*h*). So, if judgment be signed for want of a plea before the time for pleading, the rule to plead, and twenty-four hours after demand of a plea, have severally expired, and the defendant has not waived the necessity for them by pleading, &c., the court or a judge will set aside the judgment (*i*). So, if final judgment be signed before the expiration of the time limited for signing it, the court will set it aside for irregularity (*j*).

3. So, if any necessary proceeding be informal, or not done in the manner prescribed by the practice of the court, it may be set aside for irregularity. Thus, if the affidavit to hold to bail comprise two distinct causes of action which cannot be joined (*k*), or be otherwise informal or defective in any material part, (*see Vol. I. 493, 494, 495*), the court or a judge will discharge the defendant, or order the bail-bond to be delivered up to be cancelled if he have given one (*l*). So, if a judicial writ be tested (*m*) or returnable improperly, or be misdirected, (*Vol. I. 517*), or if the name of either party be omitted in it (*n*), or if the attorney's name be indorsed on it without his authority, (*see Vol. I. 51, 110*) (*o*), or if there be a material variance between the first writ and the *alias* (*p*), or if there be any other material defect in it, the court will set it aside for irregularity, and order the defendant to be discharged, or the goods seized under the writ, or the produce of them, to be returned to the defendant, as the case may require. So, if the declaration be at the suit of two plaintiffs, and the writ at the suit of one; or if the writ be against one defendant, and the declaration against two (*q*); or if the writ be in a wrong name, and the plaintiff enter an appearance for, and declare against defendant by his right name (*r*); or if the declaration be for a cause of action different from that in the writ (*s*), the court or a judge will set aside the proceedings for irregularity (*t*). So, if, in an action against two, the recognisance of bail be drawn up as in an action against one only, the court or a judge will set aside the proceedings against the bail for irregularity (*u*).

4. And, lastly, if any proceedings are had which are not warranted by the particular circumstances of the case, according to the practice of the court, or for which there is no foundation,—as, where an attachment is sued out against the sheriff, or proceedings had against the bail after the defendant has been rendered, and notice of render given to the plaintiff's attorney, or where judgment for want of a plea is signed after plea pleaded; or where the writ of execution is not warranted by the judgment, or the like,—the court or a judge will set aside the proceedings for irregularity.

3. Where it is informal, or not done in the manner prescribed by the Practice of the Court.

4. Where it is not warranted by the other Proceedings in the Case.

(*h*) *Wynn v. Clarke*, 5 Taunt. 649.

(*i*) See Vol. I. 163.

(*j*) See *Doe v. Hedges*, 4 D. & R. 393: *ante*, Vol. I. 331, &c.

(*k*) *Dean and Chapter of Exeter v. Seagell*, 6 T. R. 688: *Crooke v. Davis*, 5 Burr. 2690: *Holland v. Johnson*, Id. 697: *Hussey v. Wilson*, 5 T. R. 254: *ante*, Vol. I. 494.

(*l*) Vol. I. 501.

(*m*) *Hart v. Weston*, 5 Burr. 2586.

(*n*) *Tomson v. Browne*, Andr. 16.

(*o*) *Oppenheim v. Harrison*, 1 Burr. 20.

(*p*) *Corbett v. Bates*, 3 T. R. 660.

(*q*) But not *vice versa*, if the plaintiff drop all further proceedings against the defendant omitted in the declaration. (*Evans v. Whitehead*, 2 M. & R. 367: *Bowles v. Bilton*, 2 C. & J. 174: *ante*, Vol. I. 106, 144).

(*r*) *Hinton v. Stevens*, 4 Dowl. 283, *per Littledale, J.*

(*s*) *Tummon v. Ward*, 4 Nev. & M. 876.

(*t*) Vol. I. 145.

(*u*) *Holt v. Frank*, 1 M. & Sel. 199.

BOOK IV.
PART I.

As to setting aside proceedings against the sheriff for irregularity, see *Vol. I.* 564; the like, as to proceedings upon the bail-bond, *Id.*; and the like, as to execution sued out pending error, *Id.* 359, &c.

Distinction
between an
Irregularity
and a Nullity.

It may be added, that where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where, as frequently occurs in cases falling within the first and last of the above rules, the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding is a nullity, and cannot be waived by any act of the party against whom it has been taken (*x*).

How set
Aside.

How set Aside.] Proceedings, when irregular, are set aside upon application to the court in term time, or to a judge.

Affidavit for.

The motion to the court must be founded upon an affidavit stating the irregularity complained of (*y*); and if the irregularity be in any process, a copy of such process should be annexed to the affidavit. The affidavits must shew a clear case for relief, and therefore, where the motion was to set aside a judgment on a *cognovit*, which contained an agreement, that if there were any error in the accounts it should be rectified, and the affidavit stated that an error had been discovered, it was held to be defective for not stating what the error was, whether in amount or otherwise (*z*). The particular instances of irregularity have been already noticed throughout this Work.

Rule Nisi for.

If the court be satisfied from the affidavit that the proceedings are irregular, they will grant a rule *nisi* (*a*), and afterwards, if sufficient cause be not shewn against it, they will make the rule absolute (*b*). The rule *nisi* should correctly state the proceeding which is complained of. Therefore, where the service of the writ was irregular, but the writ was regular, and the rule was to set aside the writ, the rule was discharged with costs (*c*), and *vice versâ* (*d*). So, where the rule was to set aside a judgment for irregularity, and the real objection was, that it was signed against good faith, the court held that the applicant was bound by the form of the rule, and accordingly discharged it, but without costs (*e*). In the Common Pleas there is a rule of *M. T.*, 10 *G.* 4 (*f*), similar to a former one in the Queen's Bench of *T. T.*, 42 *G.* 3 (*g*), that in future, where a rule to shew cause is obtained for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel, at the time of making such rule absolute, shall be stated in the said rule to shew cause. And the same in a rule *nisi* to set aside an award (*h*). And this rule has been adopted in practice in the Exchequer (*i*).

(*x*) See *Smith v. Sandys*, 5 Nev. & M. 60; *Roberts v. Spur*, 3 Dowl. 551; *Hanson v. Shackleton*, 4 Dowl. 48; and *post*, 1046, 1048.

(*y*) See *Chit. Forms*, 604.

(*z*) *Pready v. Lovell*, 4 Dowl. 671.

(*a*) See the form, *Chit. Forms*, 604.

(*b*) See the forms of notice of motion to set aside proceedings for irregularity, *Chit. Forms*, 603, 604; and of notice to

sheriff to retain money levied, *Id.* 604.

(*c*) *Huggitt v. Parkin*, 1 Bing. 65.

(*d*) *Edwards v. Danks*, 4 Dowl. 357;

Hasker v. Jarmaine, 1 C. & M. 408.

(*e*) *Smith v. Clarke*, 2 Dowl. 218.

(*f*) 6 Bing. 347; 3 Moo. & P. 762.

(*g*) 2 East, 569.

(*h*) 6 Bing. 347; *R. E.*, 2 *G.* 4, *Q. B.*: 11 Price, 57.

(*i*) 11 Price, 57.

Notice of Motion and Stay of Proceedings.] Previous to moving, a notice of the intended motion should be given to the opposite party, in order to obtain a rule with a stay of proceedings in the Common Pleas(*j*) and Exchequer(*k*), but it seems not so in the Queen's Bench(*l*). In the Exchequer, a two days' notice is requisite for such stay(*m*).

CHAP. XVII.
Notice of Motion.

The rule *nisi*, when it states that "all proceedings shall be, in the meantime, stayed," suspends the proceedings for all purposes, until the rule be discharged(*n*); and therefore the time for putting in bail, for pleading, or the like, remains the same after the rule is discharged as it was when it was granted(*n*); and pending the rule the plaintiff cannot even take an assignment of the bail-bond(*n*). Nor can he move to enlarge another rule in the cause(*o*). A distinction has been taken between such rules obtained by a plaintiff and by a defendant; if obtained by a *plaintiff*, the defendant is allowed the same time, after the rule is disposed of, to take the next step, that he had when the rule *nisi* was served upon him; but if the rule were obtained by the *defendant*, then he must take the next step on the same day the rule is disposed of (if discharged) at his peril; but he is allowed the whole of that day so to do. He will not, however, be bound to do so, if the rule *nisi* expressly provide (as it sometimes does) that the defendant shall have the same time to take the next step, after the rule is disposed of, as he had at the time he obtained it(*p*). The defendant ought, therefore, (if the rule do not contain this express provision), pending the rule, to take all proceedings essential to be completed by the time the rule will be disposed of(*q*).

Stay of Proceedings.

In what Time the Application must be made, and when waived.] By a rule of all the courts of *H. T.*, 2 *W.* 4, r. 33, "No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity(*r*). And this rule, it seems, applies as well to the case of a prisoner as to other persons(*s*). It applies to the party's own acts only, and not to acts done by the opposite party for him(*t*). Where there is an irregularity in a proceeding had in vacation, and there is time in the course of that vacation to apply to a judge at chambers, it is in most cases imperative on the party complaining to do so; and he cannot wait to move to set aside the proceedings till the next term, though there have been no intermediate steps taken(*u*). If either

In what Time the Application must be made, and when waived.

(*j*) *Rolfe v. Brown*, 1 *Hodges*, 27.

(*k*) See *Hannah v. Wyman*, 3 *Dowl.* 673; *Smith v. Wheeler*, 3 *Dowl.* 431.

(*l*) *Stratton v. Regan*, 2 *Dowl.* 535: overruling *Fortescue v. Jones*, 1 *Id.* 524.

(*m*) See *Hannah v. Wyman*, 3 *Dowl.* 673.

(*n*) *Swayne v. Cramond*, 4 *T. R.* 176.

(*o*) *Wyatt v. Prebble*, 5 *Dowl.* 268.

(*p*) *Hughes v. Walden*, 5 *B. & C.* 771: *St. Hanlaire v. Byam*, 4 *Id.* 970; 7 *D. & R.* 458, *S. C.*: *Vernon v. Hodgkins*, 1 *M. & W.* 151.

(*q*) *St. Hanlaire v. Byam*, 4 *B. & C.* 970; 7 *D. & R.* 458, *S. C.*

(*r*) Although, by this rule, no act of a party can be deemed a waiver, unless it has been done with a knowledge of the

irregularity, still it rests upon the party complaining of the irregularity to shew that he had no knowledge of it. (*Anderson v. Alexander*, 2 *Dowl.* 267: *Esdaile v. Davis*, 6 *Dowl.* 465. See a collection of cases decided since this rule in *Tidd*, *New Pract.* 261).

(*s*) *Primrose v. Baddeley*, 2 *Dowl.* 350; 2 *C. & M.* 468; 4 *Tyr.* 370, *S. C.*: *Fife v. Bruere*, 4 *Dowl.* 329: *Founes v. Stokes*, 4 *Dowl.* 125: but see *Rook v. Johnson*, 4 *Dowl.* 405; 1 *T. & G.* 43, *S. C.*: *Taylor v. Slater*, 2 *Scott*, 839.

(*t*) *Per Parke, B.*, *Chalkley v. Carter*, 4 *Dowl.* 480: *Davies v. Sherlock*, 7 *Dowl.* 530.

(*u*) *Cox v. Tullock*, 2 *Dowl.* 47; 1 *C. & M.* 531, *S. C.*: and see *Hinton v. Stevens*,

BOOK IV.
PART I.

party be dissatisfied with the decision of the judge, he may apply to the court on the first day of the next term, though the judge refuses to give time for that purpose, and steps necessarily taken in the interim will not amount to a waiver of the irregularity (*x*). In such cases, where the application to the court is *prima facie* too late, but the defendant relies upon the fact of a previous similar application having been made to a judge at chambers within the proper time, the rule should be drawn up on reading the summons and order of the judge, or upon an affidavit of the fact, otherwise it will be discharged with costs (*y*).

Instances of the Effect of R. H., 2 W. 4, r. 33, as to the Time of making the Application, and how Irregularity may be waived.

As instances of the rule as to when the application should be made, and what will be a waiver of the irregularity.—An irregularity in the writ of *capias* must, before the 1 & 2 V. c. 110, have been taken advantage of within the eight days limited for putting in bail (*z*), or before an undertaking to put in bail (*a*), or before putting in bail, or paying money into court in lieu of it (*b*), and before obtaining time to put in bail (*c*), and before taking the declaration out of the office (*d*). And it would seem that a similar irregularity in the affidavit to hold to bail under the 1 & 2 V. c. 110, must be taken advantage of before taking any of the above steps, except indeed in the last instance, as to taking the declaration out of the office, for the proceedings in the action and proceedings on the arrest are now quite irrespective of each other. And the same as to the *capias*, where it is merely irregular, and not actually void. (See *ante*, 521). Also, if the plaintiff, at the defendant's request, accept without opposition bail named by the defendant, the latter cannot afterwards move to discharge the bail for a defect in the affidavit (*e*). An irregularity in a writ of summons, or in the copy served, or in the service, must be taken advantage of, according to some cases, it would seem, in four days after the service (*f*); and, at all events, before the expiration of eight days after the service, and before appearance (*g*), or an undertaking to appear (*h*). But an appearance entered by the plaintiff for the defendant does not operate as a waiver; for the rule only applies to the party's own act (*i*). By the defendant's attorney receiving notice of declaration, and saying "It is all right, I will call and settle the debt and costs,"

4 Dowl. 283; 1 H. & W. 521, S. C.; *Ellison v. Roberts*, 2 C. & M. 343; 2 Dowl. 241, S. C.; *Anderson v. Alexander*, 2 Dowl. 267; *Tyler v. Green*, 3 Dowl. 439; even where the time expires on the last day of vacation. (Id.)

(*x*) *Woodcock v. Kilby*, 1 M. & W. 41.

(*y*) *Shugars v. Concannon*, 7 Dowl. 391.

(*z*) *Sugars v. Concanen*, 5 M. & W. 30; see *Tidd*, New Pract. 262; and *per Littledale, J., Newnham v. Hanny*, 5 Dowl. 263; *Firley v. Rallett*, 2 Dowl. 708; *Fowkes v. Stokes*, 4 Id. 125; 2 Scott, 205, S. C.; *Tucker v. Colegate*, 1 Dowl. 574; 2 C. & J. 489, S. C.; see the prior cases, *Jones v. Price*, 1 East, 81; *Chapman v. Snow*, 1 B. & P. 132; *Robinson v. Nicolls*, 2 Str. 1077; *Reeves v. Hucker*, 2 C. & J. 45; *D'Argent v. Vivant*, 1 East, 330; *Mawman v. Whalley*, 6 Taunt. 185; *Dalton v. Barnes*, 1 M. & Sel. 230; 7 T. R. 376, n.; *Desborough v. Coppinger*, 8 T. R. 77; *Moses v. Richardson*, 8 B. & C. 421.

(*a*) *Holliday v. Lawes*, 3 Bing. N. C. 541.

(*b*) *Green v. Glassbrook*, 1 Bing. N. C. 516; 1 Scott, 402, S. C.

(*c*) *More v. Stockwell*, 6 B. & C. 76; 9 D. & R. 124, S. C.

(*d*) *Whale v. Fuller*, 1 H. Bl. 222; *Caswall v. Martin*, 2 Str. 1072.

(*e*) *Mammatt v. Matthews*, 4 Moo. & Sc. 356; 10 Bing. 506; 2 Dowl. 747, S. C.

(*f*) See *Chubb v. Nicholson*, 1 H. & W. 666; *Graves v. Wilter*, 1 Scott, 510; *Hinton v. Stevens*, 4 Dowl. 283; 1 H. & W. 521, S. C.

(*g*) See *per Littledale, J., in Newnham v. Hanny*, 5 Dowl. 263; *Edwards v. Collins*, 5 Dowl. 227; *Tyler v. Green*, 3 Dowl. 439; *Davis v. Sherlock*, 7 Dowl. 530, in which case the service was in a wrong county; *For v. Nuney*, 1 B. & P. 250; *R. v. Hare*, 1 Stra. 155; *Steele v. Morgan*, 8 D. & R. 450.

(*h*) See *Anon.*, 1 Chit. 129; *Hompay v. Kenning*, 2 Chit. 236; 2 Chit. 240.

(*i*) *Davis v. Sherlock*, 7 Dowl. 530; *Chalkley v. Carter*, 4 Dowl. 480; see *Ledwick v. Prangnall*, 1 Moore, 299.

the defendant waives any irregularity in the process(*k*); so he waives it by paying the debt and part of the costs(*l*), or perhaps by admitting the debt after service, and requesting time to pay it(*m*). In general, however, a defendant's asking for time does not of itself waive an irregularity in the plaintiff's last proceeding(*n*). An irregularity in an *appearance* by plaintiff for the defendant must be taken advantage of before judgment by default(*o*). An irregularity in the *notice of bail* is, in general, waived by obtaining time to inquire after them(*p*). An irregularity in the notice of, or in delivering the *declaration*, must be taken advantage of before the time for pleading has expired(*q*), and, at all events, before plea, or even before taking out a summons to stay proceedings on the bail-bond(*r*); and a variance between a notice of declaration and the writ must be taken advantage of within *four* days from the time of the service of the notice, whether in term or vacation(*s*); or perhaps, if the defendant were entitled to eight days' time to plead, then within eight days. It has been held, however, that it is not too late on the 25th to take advantage of an irregularity in declaring too soon, which has occurred on the seventh(*t*). It may be observed, that taking the declaration out of the office, or obtaining time to put in bail, does not waive any irregularity as to the declaration itself(*u*). But taking the declaration out of the office waives an irregularity in its having been filed conditionally(*x*). Where the declaration was irregularly delivered at the same time as insufficient particulars, and an order was obtained for better particulars, it was held, that the defendant's not returning the declaration was a waiver of the irregularity(*y*). There appears to be a distinction in this respect between notice of declaration filed, and delivery of declaration. If the declaration delivered, or the notice of declaration filed, be wrong, then the above rule applies; if the notice be right, and the declaration filed be wrong, then, if the declaration be not taken out of the office, the application may, it seems, be made even after judgment signed(*z*). The notice for making the application to set aside an interlocutory judgment for irregularity, begins to run from the time that notice was received of judgment being signed, and the defendant cannot as of course delay the application until a rule to compute is served(*a*). A motion to set aside an interlocutory judgment for irregularity, after notice of inquiry on the 4th of November for the 12th, was held to be too late

(*k*) *Lloyd v. Hawkyard*, 1 M. & R. 320.

(*l*) *Monday v. Sear*, 11 Price, 122.

(*m*) *Rawes v. Knight*, 1 Bing. 132.

(*n*) *Anon.*, 1 Dowl. 23.

(*o*) Pr. Reg. 32: *Williams v. Strahan*, 1 N. R. 309.

(*p*) *Foster's bail*, 2 Dowl. 586.

(*q*) See *Neunham v. Hanny*, 5 Dowl. 263; *Smith v. Clarke*, 2 Dowl. 218; *Paire v. Goodman*, 2 Smith's Rep. 391; *Minster v. Coles*, 2 Chit. Rep. 237.

(*r*) *Davis v. Owen*, 1 B. & P. 342.

(*s*) *Hinton v. Stevens*, 4 Dowl. 283: see *Golding v. Scarborough*, 2 Har. & W. 94. Where the plaintiff's declaration is delivered on the day after that on which it bears date, contrary to the rule of H. T., 4 W. 4, r. 1, the irregularity is waived by the delaying to come to the court from

the 26th October to the 9th November. (*Neunham v. Hanny*, 5 Dowl. 259).

(*t*) *Fish v. Palmer*, 2 Dowl. 460: and see *Smith v. Pennell*, 2 Dowl. 654; *sed quære*? It has been held, that, if the notice of declaration be served before process served, the defendant must apply, before judgment to set it aside. (*M'Quoick v. Davis*, 2 Chit. Rep. 164).

(*u*) *Chapman v. Eland*, 2 New Rep. 83; *Rex v. Horne*, 4 T. R. 349.

(*x*) *Gilbert v. Kirkland*, 1 Dowl. 153: and see *Archer v. Barnes*, 3 East, 342.

(*y*) *Aspinall v. Smith*, 8 Taunt. 592; 2 Moore, 655, S. C.

(*z*) See *per Littledale, J.*, 5 Dowl. 263.

(*a*) *Grant v. Flower*, 5 Dowl. 419: see *Roberts v. Cuttill*, 4 Dowl. 204.

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PART I.

on the 12th(*b*). An irregularity as to the delivering of a plea would be waived by the plaintiff's attorney accepting and keeping it, as if the plea had been pleaded by a new attorney without an order to change attorneys(*c*). But the plaintiff's demanding a particular of set-off will not waive the right to sign judgment as for want of a plea, where the plea is a nullity(*d*). An irregularity in, or omitting to give, a rule to plead or demand of plea, is waived by the defendant's pleading; and this, although the plea be a nullity upon which the plaintiff signs judgment(*e*). So, it seems, obtaining time to plead would be a waiver of a rule to plead, and obtaining time to declare would be a waiver of a rule to declare(*f*). An irregularity in the plea roll(*g*) should be taken advantage of before the defendant has accepted the issue(*h*). By accepting the issue, and not moving to set it aside or amend it at plaintiff's cost within four days, the defendant's attorney admits it to have been properly made up(*i*). An irregularity in a notice of trial or inquiry, or in the time and place of executing it, would be waived in general by the defendant or his attorney attending at the trial or inquiry, and making a defence(*j*). As to the time for moving to set aside a judgment by default for irregularity, see *ante*, 703, 704. In general, an irregularity in signing the judgment would be waived by attending the taxation of costs(*k*). Where a defendant pleaded to a *scire facias*, pending a rule he had obtained to set it aside for irregularity, the court held that he waived the irregularity by his plea(*l*). But where pending a rule to set aside a *sci. fa.*, which did not operate as a stay of proceedings, the defendant appeared to the *sci. fa.*, in order to prevent judgment, it was held to be no waiver(*m*). So, pleading to an action on a bail-bond, after demand and refusal of oyer, in order to prevent judgment being signed, is no waiver of the right to oyer(*n*). And the rule is the same as to *prisoners*(*o*); a prisoner who is supersedeable for not being declared against in time, waives the irregularity by afterwards pleading(*p*). After a lapse of two terms the court will not discharge the defendant out of custody on the ground that his addition and place of abode are not indorsed upon the *ca. sa.*(*q*).

No Waiver
unless with
Knowledge of
the Irregular-
ity.

It is also to be observed, that in general there can be no waiver unless with a knowledge of the irregularity(*r*). So an irregularity is not waived by agreeing to terms, where the party is under a misapprehension occasioned by the mistake of a judge in point of law(*s*). It rests, however, upon the party com-

(*b*) *Scott v. Cogger*, 3 Dowl. 212; and see *Smith v. Clarke*, 2 Id. 218; *Firley v. Rallett*, Id. 708; *Cox v. Tullock*, Id. 478; *sed vide Hill v. Mills*, Id. 696; *semb. contra*.

(*c*) See *Margerem v. Makilwaine*, 2 N. R. 509.

(*d*) *Ford v. Bernard*, 6 Bing. 534; 4 Moo. & P. 302, S. C.; see *Garratt v. Hooper*, 1 Dowl. 28.

(*e*) *Semble, Perry v. Fisher*, 6 East, 549; and such is the practice.

(*f*) *Towers v. Powell*, 1 H. Bl. 87.

(*g*) This roll is now abolished in all personal actions. (*Hodges v. Diley*, 7 Dowl. 555).

(*h*) *Combe v. Pitt*, 1 W. Bl. 525; 3 Burr. 1682, S. C.

(*i*) *Shepley v. Marsh*, 2 Str. 1131;

Thompson v. Tiller, Id. 1266; *Mather v. Brinker*, 2 Wils. 243; *Doe v. Cotterell*, 1 Chit. Rep. 277; *ante*, Vol. I. 203.

(*j*) See *ante*, Vol. I. 211, 212; Vol. II. 717.

(*k*) *Tidd*, 930; *ante*, Vol. I. 334.

(*l*) *Sloman v. Gregory*, 1 D. & R. 181.

(*m*) See *per curiam*, 5 East, 462.

(*n*) *Goodricke v. Turley*, 4 Dowl. 431.

(*o*) *Robertson v. Douglas*, 1 T. R. 191;

Primrose v. Baddeley, 2 Dowl. 350.

(*p*) *Pearson v. Rawlings*, 1 East, 77; 6

T. R. 224, S. C.; *ante*, 864.

(*q*) *Constable v. Fothergill*, 2 Dowl. 591.

(*r*) *Cox v. Tullock*, 2 Dowl. 47.

(*s*) *Whalley v. Barnett*, 1 Dowl. 607; 3

Tyr. 239, S. C.; and see *Woodcock v. Kiley*, 1 M. & W. 41; 4 Dowl. 730, S. C.

plaining of the irregularity to shew that he had no knowledge of it (*t*). And, indeed, it would seem to follow from one case, that, at least where the irregularity is apparent on the face of the proceeding, the applicant is bound to come promptly after he knows of the proceeding, and not merely after he knows of the irregularity itself (*u*).

CHAP. XVII.

No Waiver
where the
Proceeding is
a Nullity.

What has here been said, however, as to the time of making the application to set aside proceedings for irregularity, must be understood only of proceedings which are merely *irregular*; for, if a proceeding be completely *defective* and *void*, or, in other words, a *nullity*, the defect is not waived by any delay or any subsequent proceeding of the opposite party (*v*). Thus a writ of summons bearing date on a Sunday is a nullity, and cannot be waived (*x*). So is a notice of declaration served on a Sunday (*y*). So is service of a writ on a Sunday (*z*). So is an interlocutory judgment signed without an appearance entered (*a*). And so an affidavit taken before a person not having competent authority to take it, is a nullity, and any defect therein cannot, it seems, be waived (*b*). Where the defendant was taken in execution on a judgment, which ought to have been revived by *scire facias*, but was not so, the court held that even the delay of twelve years and more did not waive or cure the defect (*c*). So, where the maker and indorser of a note were holden to bail in one affidavit, the defect was holden not to be waived by putting in bail (*d*). So, where defendant pleaded in abatement without a proper affidavit, and signed judgment of *nonpross* for not replying thereto, it was held the judgment was irregular and not waived by the plaintiff's paying the costs of the judgment (*e*). And a demand of particulars of set-off delivered after a plea which was a *nullity*, is no waiver of the plaintiff's right to sign judgment (*f*).

And it may be observed, as a general rule, that waiver is doing something after an irregularity committed, where the irregularity might have been corrected before such act done (*g*).

Excuse for not applying in Time.] If there be any peculiar circumstances to excuse the lateness of the application, they must be clearly established by the party applying (*h*). And if the excuse be a previous application at chambers, the rule must be drawn up on reading the summons and order, or on affidavit of the fact (*i*). Delay occasioned by changing the

Excuse for not
applying in
Time.

(*t*) *Anderdon v. Alexander*, 2 Dowl. 267; *Herbot v. Darley*, 4 Dowl. 726: *Esdaile v. Davis*, 6 Dowl. 465.

(*u*) *Esdaile v. Davis*, 6 Dowl. 465.

(*v*) See *Mortimer v. Piggott*, 2 Dowl. 615; *Taylor v. Phillips*, 3 East, 156; *Osborne v. Taylor*; 1 Chit. Rep. 400; *Anon.*, 2 Id. 237; *Roberts v. Spurr*, 3 Dowl. 551; see *Moore v. Stockwell*, 6 B. & C. 76; 9 D. & R. 124, S. C.

(*x*) *Hanson v. Shackleton*, 4 Dowl. 48; 1 H. & W. 342, S. C.

(*y*) *Morgan v. Johnson*, 1 H. Bl. 628.

(*z*) *Taylor v. Phillips*, 3 East, 155.

(*a*) *Roberts v. Spurr*, 3 Dowl. 551; but see *Williams v. Strahan*, 1 N. R. 309.

(*b*) See *Sharpe v. Johnson*, 2 Bing. N. C. 246; 2 Scott, 405; 4 Dowl. 324, S. C.

(*c*) *Mortimer v. Piggott*, 2 Dowl. 615; but this decision seems questionable. (See *ante*, 819, n. (*l*)).

(*d*) *Hussey v. Wilson*, 5 T. R. 254; *ante*, Vol. I. 494.

(*e*) *Garratt v. Hooper*, 1 Dowl. 28; *ante*, 655.

(*f*) *Ford v. Bernard*, 6 Bing. 534.

(*g*) *Per cur.*, *Stevenson v. Danvers*, 2 B. & P. 110.

(*h*) See *Anderdon v. Alexander*, 2 Dowl. 267; *Herbert v. Darley*, 4 Dowl. 726; *Orton v. France*, 4 Dowl. 598; *Esdaile v. Davis*, 6 Dowl. 465.

(*i*) *Sugars v. Concanen*, 5 M. & W. 30; 7 Dowl. 391, S. C., *nom.* *Shugars v. Concanon*.

BOOK IV.
PART I.

attorney has been held insufficient(*k*). So has the illness of a witness, whose affidavit was necessary to support the application, as a commissioner might have been sent for(*l*).

Confessing
Irregularity.

Confessing Irregularity.] If the party who has committed the irregularity be satisfied that he has no sufficient cause to shew against the rule, he may save some expense by serving the opposite party with a notice, acknowledging the defect, desiring him not to proceed to make the rule absolute, and offering to pay the costs already incurred(*m*); or, if he perceive the defect before the other party has moved for a rule to set aside the proceeding, he may prevent all expense by a similar notice(*n*). And where, after service of the rule *nisi* to set aside a declaration irregularly delivered, the plaintiff's attorney offered to pay the costs, which the defendant refused, the court made the rule absolute, on the terms that the defendant should pay all the costs subsequent to the offer(*o*); and where the plaintiff signed an irregular judgment, and, on the defendant taking out a summons to set it aside, he informed the defendant that the judgment was withdrawn, it was held, that the defendant had no right to get an order drawn up for setting aside the judgment, and that, therefore, he was liable to pay the expense of it(*p*). An affidavit in support of a motion to set aside an appearance irregularly entered by a plaintiff after notice that process was abandoned need only deny the *service* of any subsequent writ(*q*).

Costs, &c.

Costs, &c.] In the case of a rule for setting aside the proceedings for irregularity, if it be made *absolute*, it is generally with costs, unless some strong grounds be shewn to the court for ordering it otherwise; so, if *discharged*, it is understood to be discharged with costs, unless the court give special directions to the contrary(*r*). But if the rule *nisi* for setting aside the proceedings be *not moved with costs*, and the rule be made absolute, no cause being shewn, it must be made absolute in the terms in which it was moved, *viz.* without costs(*s*). On the other hand, where the rule *nisi* is moved with costs, and it be discharged, it will, almost universally, be so with costs(*t*). The costs of an application to set aside a judgment for irregularity, which was granted without costs, cannot be recovered by way of aggravation of damages, in an action of trespass for seizing goods under colour of such judgment(*u*). In the case

(*k*) *Golding v. Scarborough*, 2 H. & W. 94.

(*l*) *Orton v. France*, 4 Dowl. 598.

(*m*) See form of notice, Chit. Forms, 605.

(*n*) See form of notice not to appear to process, Chit. Forms, 605. See Imp. K. B. 494, n.; and the case of an irregular judgment, *ante*, 704.

(*o*) *Briscoe v. Beckett*, 4 M. & R. 100; and see *Halton v. Stocking*, 2 C. & J. 60; 2 Tyr. 165; 1 Dowl. 296, S. C., where the attorney was made to pay the subsequent costs.

(*p*) *Hargrave v. Holden*, 3 Dowl. 176; see *Clarke v. Crockford*, Id. 693; *Robinson v. Stoddart*, 5 Dowl. 266.

(*q*) *Windle v. Hogg*, 7 Dowl. 623; see *Giles v. Hemming*, 6 Dowl. 623.

(*r*) R. M., 37 G. 3, Q. B., 7 T. R. 82. There seems to be no similar rule in C. P. or Exch. (*Anon.*, 1 Chit. Rep. 390, n.: *post*, title "Motions and Rules"). Where the rule is discharged for a formal objection to the affidavit, the court has a discretion as to the costs, and may discharge the rule without costs. (*Harris v. Matthews*, 4 Dowl. 608).

(*s*) *Per cur.*, 37 G. 3, K. B.: 1 Tidd. 524; *Rex v. Sheriff of Middlesex*, in *Duncombe v. Crisp*, 2 Dowl. 5.

(*t*) *Tilley v. Henley*, 1 Chit. Rep. 136; and see *Huggett v. Parkin*, 1 Bing. 65; 7 Moore, 359, S. C.: *post*, title "Motions and Rules."

(*u*) *Loton v. Devereux*, 10 Law Journ. 103.

of an order to set aside proceedings, a judge at chambers may, it seems, give costs(*x*), though the practice as to his giving them is by no means certain(*y*). If he refuses to give costs, the successful party must not afterwards apply to the court for them(*z*). As to the mode of enforcing the payment of costs by attachment, see *post*, *Book IV. Part III.* CHAP. XVII.

In setting aside a judgment and execution for irregularity, we have seen (*ante*, 705) that the court or judge, in general, restrains the applicant from bringing any action(*a*), where the applicant is given the costs of the application, &c. If, however, the term of bringing no action be not imposed by the court at the time of disposing of the rule for setting aside the irregular proceedings, the successful party cannot at a subsequent period be restrained from bringing an action in respect of the irregularity(*b*). Term of bringing no Action.

(*x*) *Doe Prescott v. Koe*, 1 Dowl. 274; give them.

2 Moo. & Scott, 119; 9 Bing. 104, S. C.;

see *vide Read v. Lee*, 2 B. & Ad. 415; 1

Dowl. 52, S. C.; *Spicer v. Todd*, 1 Dowl.

306. Some of the judges still doubt their

power in some cases to give costs, on an

application at chambers, and refuse to

(*y*) See *Davy v. Brown*, 1 Scott, 384.

(*z*) See *Davy v. Brown*, 1 Scott, 384.

(*a*) See *Pritchett v. Boevey*, 1 C. & M.

775; *Loton v. Devereux*, 3 B. & Ad. 343.

(*b*) *Abbott v. Greenwood*, 7 Dowl. 534.

CHAPTER XVIII.

BOOK IV.
PART I.

JUDGMENT OF NONPROS.

What.

JUDGMENT of *nonpros* is a final judgment for costs only, signed by the defendant, whenever the plaintiff, in any stage of the cause, neglects to prosecute his suit, or part of it, within the time limited by the rules of the court for that purpose.

For not De-
claring.

For not Declaring.] We have already noticed (*ante*, Vol. I. 137) the time within which the plaintiff *must* declare; and that if the plaintiff do not declare within such time, or within such further time to declare as he may obtain of the court or a judge, the defendant may, at the expiration of *four days* next after a *written demand* of declaration served upon the plaintiff, his attorney, or agent, as the case may be, sign judgment of *nonpros* (*a*). The demand cannot be made until after the time in which the plaintiff is bound to declare (*b*). If such a demand has been made, and time to declare obtained, the defendant may sign judgment of *nonpros* without a fresh demand of declaration (*c*). But judgment of *nonpros* cannot be signed after a declaration, &c., has been actually delivered or tendered, although the time has expired (*d*); unless the delivery of the declaration, &c., be a fraud on the court, as in *Ariel v. Barrow* (*e*), where the plaintiff delivered a declaration, after having obtained a rule to discontinue on payment of costs, and the court refused to set aside a judgment of *nonpros* signed after delivery of declaration.

Where there
are several
Defendants.

If the action be against *several* defendants, the plaintiff may be *nonpros*ed by any one, if all have appeared; but if all have not appeared, then those, or any one of those, who have appeared cannot *nonpros* the plaintiff (*f*), even in trespass; unless the plaintiff have actually declared against some of them, or have taken out a rule for time to declare against some of them, in which case the others may sign judgment of *nonpros* (*g*). Also, where several defendants are entitled to

(a) This four days' demand is required by the R. T., 1 W. 4, r. 8, by which it is ordered, "That no judgment of *nonpros* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney, or agent, as the case may be." (See the former practice, Tidd's New Pract. 225). That rule, as far as it related to a demand of replication and subsequent pleadings, is altered by the R. H., 2 W. 4, r. 1, s. 54, *ante*, Vol. I. 195, which makes a service of a rule to reply or plead a subsequent pleading a sufficient demand of such replication or subsequent pleading. By R. H., 2 W. 4, r. 1, s. 38, it shall not be

necessary for a defendant, in any case, to give a rule to declare, except upon removal from inferior courts. (See the form of the judgment, Chit. Forms, 606).

(b) *Harris v. Duncan*, cor. *Patteson*, J. at chambers, Feb. 1837.

(c) *Wells v. Hare*, 1 Dowl. 366; *Teulon v. Grant*, 5 Dowl. 153.

(d) *Gray v. Pennell*, 1 Dowl. 120.

(e) *Ariel v. Barrow*, 8 Bing. 375.

(f) *Philpott v. Muller*, 1 Doug. 169, n.; *Palmer v. Fiessel*, 2 Dowl. 507; see *Innwood v. Mawley*, 5 D. & R. 351; 3 B. & C. 553, S. C.; *Jones v. Gibson*, 5 B. & C. 768; 8 D. & R. 592, S. C.; *Murphy v. Donlan*, 5 B. & C. 178; 7 D. & R. 618, S. C.

(g) *Roe v. Cock*, 2 T. R. 257; *Buller v. Upton*, Id. 259, n.

sign judgment of *nonpros*, they can sign but one judgment, although they have appeared severally by separate attorneys (*h*). The judgment should be a general judgment against plaintiff (*i*), except in the cases above mentioned.

In proceedings to outlawry, if the defendant be taken, or appear voluntarily on the *exigi facias*, the plaintiff must declare against him within the usual time limited upon proceedings by summons; otherwise the defendant may, four days after a declaration has been demanded in writing, sign judgment of *nonpros* (*k*). But if the defendant be outlawed, and afterwards come in and reverse the outlawry, although the plaintiff must declare against him (if at all) within two terms after the reversal, yet the defendant cannot sign judgment of *nonpros*, if the plaintiff fail to do so (*l*).

After Outlawry.

If the plaintiff in replevin do not declare before four days have expired after the service of the rule to declare, and a four days' demand of declaration in writing, the defendant may sign judgment of *nonpros* (*m*). So, if he do not declare upon a writ of second deliverance, within the time limited for that purpose, the defendant may sign judgment of *nonpros* (*n*).

In Replevin.

Where a cause is removed from an inferior court by writ of *habeas corpus cum causa*, the plaintiff (if he declare at all in the court above) must declare before the end of the term next after that in which bail is put in; but after a removal by the defendant judgment of *nonpros* cannot be signed if he fail to do so (*o*); otherwise after a removal by the plaintiff (*p*).

After Removal from inferior Court.

Before the defendant can sign judgment of *nonpros* for not declaring, he must have appeared to the action (*q*), and, if he allows the plaintiff to appear for him according to the statute, he cannot *nonpros* him (*r*). Since the 2 *W. 4, c. 39*, and 1 & 2 *V. c. 110*, it would seem that the time for demanding a *nonpros* will be regulated in all cases by the appearance to the writ of summons; and the defendant may, it seems, enter an appearance, so as to entitle him to demand a declaration or *nonpros*, at any time before the plaintiff has entered an appearance for him, and while the cause is in court (*s*). Where it appeared that the defendant, on entering an appearance to the writ of summons, had made a mistake in the names of the parties, and notice being given to him of the fact by the plaintiff, he promised to amend, but instead of doing so entered a new appearance, and then demanded a declaration, and the plaintiff not declaring till the following term, he signed judgment of *nonpros*, the court was of opinion

When Defendant may sign.

(*h*) *Price v. Foulkes*, 4 Burr. 2418; 1 Co. myns, 74; *Allington v. Vavasor*, 2 Salk. 455.

(*i*) See *Jones v. Gibson*, 5 B. & C. 768; 8 D. & R. 592, S. C.

(*k*) See form of such judgment, Chit. Forms, 557.

(*l*) See *ante*, 934.

(*m*) See as to this judgment, *ante*, 799; see Chit. Forms, 438 to 442. The R. H., 2 W. 4, r. 1, s. 38, requires the rule to declare in all cases of removals from inferior courts (*ante*, 1052, n. (*a*)).

(*n*) See *ante*, 799, 800.

(*o*) *Ante*, 949; *Clark v. Mayor of Berwick*, 4 B. & C. 649.

(*p*) *Ante*, 949.

(*q*) See *Hall v. Champneys*, 4 Dowl. 713; 1 Tyr. & G. 496, S. C.

(*r*) The judgment of *nonpros* is founded on the 13 Car. 2, st. 2, c. 2, s. 3, from the wording of which, it would appear that to sign judgment of *nonpros* for not declaring an appearance, must have been entered "for the defendant by attorney, in the term wherein the process is returnable." At that time an appearance could not be entered by the plaintiff for the defendant, the 12 Geo. 1, c. 29, being the first statute allowing it.

(*s*) See *Price's Pract.* 283, and see the former practice: *Primrose v. Bradley*, 6 East, 314.

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that the defendant had been irregular in not amending the appearance, and therefore directed the judgment to be set aside (*t*).

It may be necessary here to observe, that judgment of *nonpros* must be signed within a year from the execution of the process, and cannot be signed afterwards (*u*).

For not Re-
plying, &c.

For not Replying, &c.] If the plaintiff do not reply, surrejoin, surrebut, &c., within the time limited for that purpose after service of the rule, (*see ante*, Vol. I. 196, 197), or specified in an order for further time, the defendant may sign judgment of *nonpros*, unless the replication, &c., has actually been delivered or tendered before signing judgment (*v*). And even where the plea concludes to the country, if the plaintiff be ruled to reply, he must, it seems, actually deliver the *similiter* within the time limited by the rule, otherwise the defendant may sign a *nonpros* (*w*). Service of a rule to reply, or to plead any subsequent pleading, is a sufficient demand of a replication or such other subsequent pleading, and therefore a separate demand is not requisite (*x*).

May be signed
as to Part of
the Suit.

It may be observed, that a judgment of *nonpros* may be signed to any part of the suit which is not prosecuted. Thus, for instance, if the declaration contain two counts, and the defendant plead *non assumpsit* to the first count, and the Statute of Limitations to the second, and the plaintiff reply to the plea of the Statute of Limitations, but omit adding the *similiter* to the plea of *non assumpsit*, defendant ruling the plaintiff to reply, and waiting four days after it, might sign a judgment of *nonpros* to the first count. But in such or in any other case where the plaintiff has so replied, &c., so as to leave part only of the defence answered, the defendant could not sign judgment of *nonpros* as to the whole action, but only as to such part of it as remains not prosecuted by the plaintiff. Where the defendant pleaded by mistake the general issue to three instead of four counts, and plaintiff replied, and then defendant amended his plea by extending it to the fourth count, and plaintiff not having replied to the amended plea, although ruled so to do, defendant signed judgment of *nonpros* to the whole action—it was held that this was irregular (*y*). And, where defendant pleaded payment into court to the whole declaration, and other pleas to all except the sum paid in, and the plaintiff replied to the plea of payment into court only, that he accepted the sum paid in and was satisfied, it was held, that the defendant could not sign judgment of *nonpros*, for want of a replication to the other pleas (*z*); but where the payment into court is pleaded only to part, the plaintiff must reply to the other pleas, or the defendant will be entitled to

(*t*) *Bate v. Bolton*, 2 C., M. & R. 365; 4 Dowl. 100, S. C.; and *see Id.*; 1 Tyr. & G. 148; 4 Dowl. 677.

(*u*) *See R. H.*, 2 W. 4, r. 35: *Cooper v. Nias*, 3 B. & Ald. 271; 1 Chit. Rep. 669, S. C. The return day of the process is the day it is executed. (*See Hodgson v. Mee*, 5 Nev. & M. 302; 3 A. & E. 765, S. C.)

(*v*) *Gray v. Pennell*, 1 Dowl. 120. If the delivery of replication, &c., be a fraud on the court, judgment may be signed,

notwithstanding delivery. (*Ariel v. Barrow*, 8 Bing. 375).

(*w*) *Hollis v. Buckingham*, 3 D. & R. 1. *See the forms of judgment for not replying*, Chit. Forms, 608.

(*x*) *R. H.*, 2 W. 4, r. 1, s. 54, *ante*, Vol. I. 195.

(*y*) *Dordsey v. Cook*, 4 B. & C. 135.

(*z*) *Coates v. Stevens*, 2 C., M. & R. 118; 1 Gale, 75; 3 Dowl. 784, S. C.

judgment of *nonpros* on the unanswered pleas(*a*). As to a CHAP. XVIII.
nonpros by one of several defendants, see *ante*, 1052.

In replevin, after the defendant has avowed, he may rule In Replevin.
 the plaintiff to plead, in the same manner as he is ruled to re-
 ply in other actions; and if the plaintiff neglect to plead within
 the time limited by the rule, the defendant may sign judgment
 of *nonpros*(*b*).

As to *nonprossing* the plaintiff in ejectment, see *ante*, 751, In Ejectment.
 752.

If the plea be a *nullity* and not merely *irregular*, it seems Where Plea a
 that no judgment of *nonpros* could be regularly signed for not Nullity.
 replying to it(*c*).

[*For not entering the Issue.*] Formerly, if the plaintiff did For not enter-
 not bring in the record before the expiration of the rule to ing the Issue.
 enter the issue, the defendant might have signed judgment of
nonpros; but now there is no occasion to enter the issue, and
 no rule for that purpose, and, consequently, no judgment can
 be signed against plaintiff for not entering it(*d*).

[*In Error.*] As to when the defendant in error may sign In Error.
 judgment of *nonpros* for not transcribing the record, see *ante*,
Vol. I. 368(*e*).

As to when the defendant in error may sign judgment of
nonpros for not assigning error, &c., see *Vol. I.* 369(*f*).

[*In other Cases.*] On a rule to discontinue after plea pleaded, In other Cases.
 such rule containing an undertaking by plaintiff to pay the
 costs, and a consent, that, if they are not paid within four
 days after taxation, the defendant shall be at liberty to sign
 judgment of *nonpros*; in such case, if the plaintiff do not pay
 the costs within that time, defendant may have a judgment of
nonpros accordingly(*g*). A judgment of *nonpros* cannot be
 signed when the proceedings have been stayed by a general
 order for particulars (*ante*, 1032). Where the plaintiff's pro-
 ceedings in a second action are stayed until he have paid the
 costs of a former action, the court will not allow the defend-
 ant to *nonpros* the second action, for non-payment of these
 costs(*h*). Where the tenant in a writ of right, not being able
 to discover who the demandant was, obtained a judge's order,
 directing the attorney to deliver to the tenant's attorney the
 true name and address of his client, the court refused to allow
 the tenant to sign judgment of *nonpros* for disobedience of
 this order. It seems that the proper course in such a case
 would be, to make the judge's order a rule of court, and then
 move for an attachment against the attorney(*i*).

[*How Signed.*] If an appearance has not been already entered How Signed.
 by the defendant, *enter it as usual*(*k*). *Make an incipitur on*

(*a*) *Topham v. Kidmore*, 5 Dowl. 676,
 even where the plea is irregular in form.
 (*Emmott v. Standen*, 3 M. & W. 497; 6
 Dowl. 591, S. C.)

(*b*) See as to this judgment, *ante*, 804,
 805: see Chit. Forms. 431 to 442.

(*c*) *Garratt v. Hooper*, 1 Dowl. 28.

(*d*) See *Hodges v. Diley*, 7 Dowl. 555.

(*e*) And see Chit. Forms, 114.

(*f*) Id.

(*g*) R. H., 2 W. 4, r. 106: see *post*,
 1058.

(*h*) *Doe Sutton v. Ridgway*, 5 B. &
 Ald. 523.

(*i*) *Dumsday v. Hughes*, 2 Scott, 377.

(*k*) See *ante*, Vol. I. 121.

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a roll of the day of the declaration, if any; or if no declaration, then of the day judgment is to be signed, and also on a judgment paper (!): or, if in the Common Pleas or Exchequer, write the judgment upon plain paper. Take them to the master, who will sign the judgment. Get him to tax the costs, and he will mark the same upon the judgment paper. After judgment signed and costs taxed, you may proceed to sue out execution.

Also, in error, judgment of *nonpros* is signed as above directed.

In what Cases
set Aside.
When regular.

In what Cases set Aside.] If the judgment be regular, it is discretionary with the court to set it aside, upon an affidavit that there is a good cause of action on the merits, or that there is a present cause of action (*m*), and upon payment of costs, in order to let in a trial of the merits. They have refused to set it aside in an action by a common informer (*n*).

When irregular.

But if the judgment be irregular, the court will in all cases set it aside with costs; and if an action or other proceedings be had upon such a judgment, one rule is all that is requisite in order to set aside such proceedings, as well as the judgment (*o*).

Costs and
Execution,
&c.

Costs and Execution, &c.] The defendant is entitled to costs in all cases, (23 *H.* 8, c. 15: 8 *El.* c. 2: 13 *C.* 2, st. 2, c. 2: 4 *J.* 1, c. 4) (*p*), even in an action by a common informer (*q*), excepting upon a *nonpros* for not transcribing, in error (*r*). We have already seen (*ante*, 751—753) when the defendant in ejectment is entitled to the costs of a *nonpros*. For these costs the defendant may either sue out execution by *ca. sa.* or *feri facias* (*s*), or he may proceed by debt on the judgment, in which he would have a right to his costs, notwithstanding the 43 *G.* 3, c. 46, s. 4 (*t*). Under the execution you cannot levy more than the sum recovered by the judgment; consequently, the sheriff's poundage or fees, or other expenses of the execution, cannot be levied (*u*).

Proceedings
after it.

Proceedings after it.] After being *nonprossed*, the plaintiff may commence a new action against the defendant, for the same cause; and he may, as in other cases, obtain an order to hold the defendant to bail, if the action be bailable, and the defendant be about to leave England, unless forthwith apprehended (*x*).

(*l*) See the forms referred to in preceding pages, *ante*, 1053, 1055.

(*m*) *Cortessos v. Hume*, 2 Dowl. 134.

(*n*) *Bennett v. Smith*, 1 Burr. 401.

(*o*) *Barlow v. Kaye*, 4 T. R. 638: see *Kibblewhite v. Jeffrys*, 1 Chit. 142.

(*p*) *Davies v. James*, 1 T. R. 373. The plaintiff was liable even before the 3 & 4 W. 4, c. 42, s. 31, (*ante*, 876), although he sued as executor. (*Hawes v. Saunders*, 3 Burr. 1585: *Higgs v. Warry*, 6 T. R. 654). But he was not so liable before that act (sect. 32), and R. H., 4, W. 4, r. 15, on a judgment of *nonpros* obtained by reason of the plaintiff's having omitted to enter the issue on record, after joinder in de-

murrer to a plea in *abatement*. (*Michlam v. Bate*, 8 B. & C. 642; 3 M. & R. 91, S. C.: *ante*, 656.)

(*q*) 18 *El.* c. 5: *Law v. Worrall*, 1 Wils. 177.

(*r*) *Salt v. Richards*, 7 East, 110: see *College of Physicians v. Harrison*, 9 B. & C. 525: *ante*, Vol. I. 379.

(*s*) *Murray v. Wilson*, 1 Wils. 316. See the form, Chit. Forms, 610.

(*t*) *Bennett v. Neale*, 14 East, 343.

(*u*) *Baker v. Sydee*, 7 Taunt, 180: *Anon.*, 2 Chit. Rep. 353.

(*x*) *Turton v. Hayes*, 1 Stra. 439: see 1 & 2 V. c. 110, s. 3.

CHAPTER XIX.

DISCONTINUANCE.

CHAP. XIX.

What, &c.] IT is unnecessary, in a work of this nature, to treat particularly of the subject of discontinuance; it is sufficient to know that it never can be the subject of objection *pendente placito* (a), and that, after verdict, it is cured by the statute of Jeofails, 32 H. 8, c. 30 (b).

Continuance.] Formerly, after declaration, and before issue joined, the proceedings were continued by imparlance; (see *ante*, 802; Vol. I. 155) (c); after issue joined and before verdict, by *vicecomes non misit breve*; after demurrer, and before judgment, by *curia adrisari cult*; after issue joined upon *nul tiel* record, by *curia adrisari cult*, &c.; after verdict and before judgment, in actions tried at the assizes, and in cases of special verdicts, by *curia adrisari cult*; after joinder in error and before judgment, also by *curia adrisari cult* (d). But now, by rule of all the courts of H. T., 4 W. 4, r. 2, "no entry of continuances by way of *imparlance*, *curia adrisari cult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained. Provided that such regulation shall not alter or affect any existing rules of practice as to the *times of proceeding* in the cause" (e). It has been doubted, whether this rule abolishes imparlances in proceedings by *scire facias* (f), or in actions not commenced by the process prescribed by the Uniformity of Process Act (g).

Rule to Discontinue.] If the plaintiff find that he has misconceived his action, or that for some defect in the pleadings, or other reason, he will not be able to maintain it, he may obtain a rule for leave to discontinue. This indulgence, however, is granted only to plaintiffs; even an avowant in replevin cannot have it (h). The terms upon which a party is allowed to discontinue are in the discretion of the court. It is granted always upon payment of costs (i). Where the defendant is a justice of peace, and in some other actions against public officers and others, if the plaintiff discontinue, it must be upon payment of double costs (j).

(a) *Beecher v. Shirley*, Cro. Jac. 211.(b) See as to continuances of process, *ante*, 923. See *Humble v. Bland*, 6 T. R. 255; *Wynn v. Wynn*, 1 Wils. 40; *Richards v. Brown*, 1 Doug. 115.(c) *Chit. Forms*, 368.(d) See *Curthuis v. Pardey*, 1 Salk. 179; *Wilkes v. Wood*, 2 Wils. 203; see *Doe Mears v. Dolman*, 7 T. R. 618.

(e) By the prior rule of H. T., 2 W. 4, r. 105, the entry of continuances after judgment by default, and before execu-

tion of writ of inquiry, was rendered unnecessary, which was otherwise in the Queen's Bench, before that rule.

(f) *Doe Phillips v. Roe*, M. 1839; B. C., 3 Jurist, 1836.(g) *Ante*, 802.(h) *Long v. Buckeridge*, 1 Str. 112.

(i) See 8 Eliz. c. 2, s. 2, Comb. 299.

(j) And see as to actions against officers of excise and customs, and other officers, *ante*, 910, 911: see *Devenish v. Mertins*, 2 Stra. 974; *ante*, 914.

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PART I.How, and
when ob-
tained.

How and when Obtained.] This rule may be had at any time after the commencement of the action, and before trial or writ of inquiry. The court may grant the rule after a rule for a new trial, upon the terms of plaintiff's paying the costs of the trial(*j*). They may also grant it, as a matter of especial favour, even after a special verdict(*k*); but they will not do so in a hard action(*l*), or to give the plaintiff an opportunity to adduce fresh proof in contradiction to the verdict(*m*). Nor will they ever grant it after a general verdict(*n*), or after a writ of inquiry executed and returned(*o*), unless with the defendant's consent. The court, however, have allowed the plaintiff to discontinue upon payment of costs after a demurrer argued and allowed, where there was a mistake in the plaintiff's pleading(*p*); and the court frequently give the party leave to amend upon payment of costs(*q*).

Motion and
Rule for.

Before argument on demurrer, verdict, or execution of a writ of inquiry, *this is a mere side-bar rule, and may be had as a matter of course from the master(r).* In other cases it is obtained upon application to the court, and is but a rule nisi, which you must afterwards proceed to make absolute in the ordinary way. Formerly, in the Common Pleas, if the rule to discontinue were obtained after plea pleaded, the defendant's attorney or agent must have consented to a rule in the treasury chamber in term time, or before a judge in vacation, or else there must have been a rule to shew cause. But by rule *H. T.*, 2 *W.* 4, *r.* 106, of all the courts, "To entitle a plaintiff to discontinue after a plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking(*s*) on the part of the plaintiff to pay the costs, and a consent, that, if they are not paid within four days after taxation, defendant shall be at liberty to sign a *nonpros*. As soon as you have obtained the side-bar rule, or rule absolute, take it to the master, and get an appointment on it to tax the costs. Serve a copy of the rule and appointment on the defendant's attorney or agent; and attend at the time appointed, and the master will tax the costs.

What Costs
payable.

Upon the question as to what costs will be allowed, it has been recently decided that the defendant is not entitled, under any circumstances, to the costs of the draft or copies of the briefs, where the plaintiff discontinues without having given notice of trial(*t*).

Consequence
of not paying
Costs.

These costs should be paid forthwith; for, until paid, the action is not discontinued, and the plaintiff may be compelled to proceed therein as usual(*u*). And where the plaintiff, instead of paying costs, went on and obtained a verdict, *Parke, J.*, refused to set aside the verdict, and order a discontinuance to be entered(*x*). But if the rule be obtained after plea

(*j*) *Sweeting v. Halse*, 9 B. & C. 369: and see *Jackson v. Hallam*, 2 B. & Ald. 317; 1 Chit. Rep. 19, S. C.

(*k*) *Price v. Parker*, 1 Salk. 178: *Good-enough v. Butler*, 3 Dowl. 751.

(*l*) *Boucher v. Lawson*, Hardw. 200, 201.

(*m*) *Roe v. Gray*, 2 W. Bl. 815.

(*n*) *Price v. Parker*, 1 Salk. 178: *Good-enough v. Butler*, 3 Dowl. 751.

(*o*) *Stephens v. Etherick*, Carth. 86; 1 Show. 63, S. C.

(*p*) *Red v. Burnis*, 2 Lev. 124: *Ent v. Withens*, Id. 209; 1 Saund. 23: *Pugh v. Robins*, 1 T. R. 116; 1 Saund. 39: but

see *Turner v. Turner*, 1 Salk. 179.

(*q*) 2 Saund. 73, n. (1): *ante*, 665.

(*r*) See the forms, Chit. Forms, 589.

(*s*) See form of rule and undertaking, Chit. Forms, 612.

(*t*) *Doe Postlewaite v. Neale*, 2 M. & W. 732; 6 Dowl. 166, S. C.

(*u*) *Molling v. Buckholtz*, 3 M. & Sel. 153: *Edgington v. Proudman*, 1 Dowl. 152. MS., T. 1814: *Whitmore v. Williams*, 6 T. R. 765: see *White v. Gompertz*, 5 B. & Ald. 905; 1 D. & R. 556, S. C.

(*x*) *Edgington v. Proudman*, 1 Dowl. 152.

pleaded, and contain, as it should do, the plaintiff's consent, that if they are not paid within four days after taxation, the defendant shall be at liberty to *sign judgment of nonpros* (*y*), then if they be not so paid, the defendant may sign such judgment as of course (*z*). But the defendant would not be entitled to judgment as in case of a nonsuit (*a*). Nor is the plaintiff, it seems, liable to an attachment for the non-payment of these costs (*b*).

In some rare cases the plaintiff will be allowed to discontinue without payment of costs (*c*). And sometimes by consent the rule to discontinue is drawn up without costs.

When the costs are paid, but not before, the defendant may, by motion or summons and order, compel the plaintiff to enter the judgment of discontinuance and carry in the judgment roll.

Compelling Plaintiff to enter Discontinuance.

When Discharged.] It is in the power and discretion of the court or a judge to discharge the rule to discontinue. Where, in a case before the 1 & 2 *Viet. c.* 110, a plaintiff, merely because he did not like the bail in the first action, discontinued, and held the defendant again to bail in the second action, the court considered this conduct unwarrantable, and discharged the side-bar rule, thereby leaving the first bail still liable on their recognisance (*d*). Yet, in another case, before that act, and also before the 2 *Will. 4, c.* 39, where it appeared clearly that the bail in the first action had forsworn themselves, and were in fact worth nothing, the court held that the plaintiff was justified in holding the defendant to bail in a second action for the same cause, even before he had discontinued the first; for, had he discontinued, it is very probable the defendant would have absconded (*e*).

When Rule to discontinue discharged.

New Action.] After the costs have been taxed and paid (*f*), the plaintiff may commence a new action for the same cause. And before the 1 & 2 *V. c.* 110, if the first action were upon common non-bailable process, the plaintiff might have held the defendant to bail for the same cause, (if bailable), even before the first action was discontinued (*g*), provided he discontinued before declaring, otherwise the defendant might have pleaded the pendency of the prior action in abatement. But if the defendant were held to bail in the first action, he could not have been held to bail a second time without a judge's order (*h*).

New Action.

(*y*) See form of entry on roll, Chit. Forms, 612.

(*z*) See R. H., 2 W. 4, r. 106, *ante*, 1058.

(*a*) *Cooper v. Holloway*, 1 Hodges, 76.

(*b*) *Stokes v. Woodeson*, 7 T. R. 6: and see *Rer v. Fenn*, 2 Dowl. 182: *Turner v. Gill*, 3 Dowl. 31.

(*c*) See *Ames v. Ragg*, 2 Dowl. 35. See as to costs of trial where plaintiff discontinued instead of proceeding to a new trial, *Gray v. Cox*, 3 D. & R. 220. See *Patterson v. Powell*, 2 Dowl. 738.

(*d*) *Belchier v. Gansell*, 4 Burr. 2502.

(*e*) *Ante*, Vol. I. 476: *Olmius v. Delany*, 2 Str. 1216: *quere*, whether, since the

Uniformity of Process Act, 2 W. 4, c. 39, the first action must not be discontinued before commencing the second, otherwise the pendency of the first might be pleaded in abatement.

(*f*) *Molling v. Buckholtz*, 3 M. & Sel. 153: *Whitmore v. Williams*, 6 T. R. 765; MS., T. 1814.

(*g*) *Bishop v. Powell*, 6 T. R. 616: *Anon.*, 1 Dowl. 59; *Id.* 57: *ante*, Vol. I. 476: *sed quere*, since the Uniformity of Process Act, it would seem, the first action ought to be discontinued.

(*h*) R. H., 2 W. 4, r. 7: see *ante*, Vol. I. 476.

CHAPTER XX.

BOOK IV.
PART I.

CASSETUR BREVE.

What and
when entered.

WHEN the defendant pleads sufficient matter in abatement, and the plaintiff cannot deny it, the latter may either obtain leave to amend his declaration, if that will answer his purpose (*a*), and which will be granted upon payment of costs (*b*), or he may at once enter on the roll a judgment that the writ be quashed, in order that he may be enabled to commence a new action. If he adopt the latter mode, let him *get a roll of the day the declaration is delivered, and enter the declaration and plea on it, as in ordinary cases, and lastly the cassetur* (*c*). *Docket it with one of the masters, as in ordinary cases, and get it marked by him; after which, file it in the treasury of the court.* In the Common Pleas, *instead of docketting the roll with one of the masters, &c., it seems that you have to take the roll to the master's, and docket it in the book kept there for the purpose, which the clerk will give you.* Leave of the court is not necessary in order to make this entry; nor is the plaintiff obliged to pay the defendant's costs (*d*).

As to quashing a writ of error, see *ante*, Vol. I. 353.

(*a*) It will not if the writ be wrong also, and if that cannot be amended. As to when the writ may be amended, see *ante*, Vol. I. 522.

(*b*) *Mestaer v. Hertz*, 3 M. & Sel. 450, and sometimes without. (See *Wall v. Lyon*, 9 Bing. 411; 1 Dowl. 714, S. C.)

(*c*) See the form, Chit. Forms, 613.

(*d*) Pr. Reg. 6, *ante*, 656. Formerly, after entering a *cassetur breve*, the plaintiff

might deliver another declaration by the bye for the same cause of action, at any time within the term in which the writ was returnable (*Miller v. Andrew*, 5 T. R. 634); but if that time had elapsed, he must have sued out new process, if he wished to re-commence his action. The practice of declaring by the bye is, however, now abolished. (See Vol. I. 136).

CHAPTER XXI.

PUTTING OFF THE TRIAL.

CHAP. XXI.

In what Cases.

Absence of
material Wit-
ness, &c.

In what Cases.] IF there be any *bonâ fide* and unavoidable reason or fact properly shewn, on affidavit, why it is unsafe to proceed to trial, the court will in general put off the same. Thus the court will, in general, when a material witness for either party is absent, allow the trial to be put off, either to another day of the same sittings, or to another sitting in the same term, or to another term, or even for a longer period, under particular circumstances(*a*); to another day of the same sittings or assizes, at the instance of either party; to another sittings, term, or assizes, at the instance of the *defendant* only, for a plaintiff may have all the effect of such an application by withdrawing his record(*b*). They have put off a trial until a commission should go to examine a material witness abroad who refused to attend, and until the deposition should be certified(*c*). They have refused it, however, in another case, where it did not appear that there was any likelihood of the witness's return(*d*); and the same where the witness did not go abroad until after notice of trial was given, and he might consequently have been served with a *subpœna* in sufficient time(*e*); and they will also, it seems, in general refuse it, if the party applying have conducted himself unfairly, or have been the cause of any improper delay(*f*). They have also refused it, upon the application of the plaintiff, in a penal action(*g*); and, in another case, where the evidence of the absent witness was intended to sustain a defence not approved of by the court(*h*). In an action for libel, where a justification was pleaded, the court, upon the application of the defendant, put off the trial, to enable him to procure the attendance of witnesses from abroad, (the nature of the evidence being particularly pointed out in the affidavit), but imposed the terms of his admitting upon the trial the publication of the alleged libel(*i*). Even where the court had twice before put off the trial, on account of the absence of a material witness on a whaling voyage, and the defendant applied a third time to put off the trial, on account of the witness being still absent, the court granted the application, upon the terms of the defendant's bringing the money into court, or giving security for it

(a) See *Stratford v. Marshall*, Barnes, 440: *Grierson v. Aird*, 1 Hodg. 76.

(b) MS., H. 1826, *cor. Abbott*, C. J.; see *Curtis v. Barker*, 2 C. & P. 185: *Ansley v. Birch*, 3 Camp. 333; 2 Taunt. 221.

(c) *Rex v. Williams*, 1 W. Bl. 512, cited: see *Farley v. Neunham*, Doug. 419, 420: *Mostyn v. Fabrigas*, Cowp. 174: and see *Calliand v. Vaughan*, 1 B. & P. 210.

(d) *Rex v. D'Eon*, 1 W. Bl. 515: see *Lord v. Cooke*, 1 W. Bl. 436.

(e) *Bourne v. Church*, Barnes, 442: and

see *Postan v. Rose*, 4 C. & P. 271.

(f) *Saunders v. Pitman*, 1 B. & P. 33: *Taylor v. Gilkes*, 1 Chit. Rep. 730: *Wade v. Birmingham*, 2 Chit. Rep. 5; 1 M. & R. 111 (*a*), S. C.

(g) *Tidd*, 771, n.

(h) *Robinson v. Smith*, 1 B. & P. 454. As a plea in abatement, *Wade v. Birmingham*, 2 Chit. Rep. 5.

(i) *Brown v. Murray*, 4 D. & R. 830: and see *McCawley v. Thorpe*, 1 Chit. Rep. 685.

BOOK IV.
PART I.

to the satisfaction of the master(*k*). So, where the copy of a judicial document in the West Indies was stated to be material and necessary evidence for the defendant, the court put off the trial to give time to procure it, and refused to go into the question of its admissibility(*l*).

Other
Grounds.

There are also other grounds upon which the court will put off a trial, besides that above mentioned of the absence of a material witness. Where the defendant's attorney was so ill that he could not attend, the court, upon application, put off the trial(*m*). Where a libel was published immediately before the assizes, with an intent to influence the jury, the court, upon application, put off the trial(*n*). Where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact in the other two; the court, upon application of the defendants, put off the trials of the issues in fact, until the demurrer should first be argued, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions(*o*). But where there is only one action, and there are several issues in it in law and in fact, the court will not, in general, put off the trial on the application of the defendant, until the demurrer has been argued(*p*). The court has refused to put off a trial until a suit concerning the same matter in the ecclesiastical court should be determined(*q*). So, they have refused to put off the trial of a cause brought by the assignees of a bankrupt, because a petition is pending against the commission of bankruptcy(*r*). And the same, where the ground of the application was, that an indictment for perjury, founded on the plaintiff's affidavit of debt, was pending(*s*). They have refused it, also, where the application was made merely because counsel was not prepared(*t*). Also, where the defendant was arrested as he was coming to court to attend his cause, the judge at *Nisi Prius* refused to put off the trial on that account, unless upon payment of costs(*u*).

Issue out of
Chancery.

And, lastly, the court or a judge at *Nisi Prius* will put off the trial of an issue out of Chancery, for the same reasons and under the same circumstances as in ordinary actions(*v*).

The Applica-
tion for.

The Application for.] The application must be made either to the court, or to the judge at *Nisi Prius*; and should, it seems, be made at least two days before the day of trial(*w*). Or, if the grounds of the application have occurred or become known to the party so recently, that he cannot make it in the above time, he may apply to the judge at *Nisi Prius* just before or even after the cause has been called on, who will accordingly put off the trial, if satisfied as to the sufficiency of

When and to
whom made.

(*k*) MS., E. 1820.

(*l*) *Mackenzie v. Hudson*, 1 D. & R. 152.

(*m*) *Hayley v. Grant*, Sayer, 63: *Willis v. Farrer*, 3 Y. & J. 381.

(*n*) *Rex v. Gray*, 1 Burr. 510: see *Coster v. Merest*, 7 Moore, 87; 3 B. & B. 272, S. C.

(*o*) *Burdett v. Coleman*, 13 East, 27.

(*p*) *Ante*, §62.

(*q*) *Anon.*, 2 Salk. 649: *Salisbury v. Proctor*, Id. 646.

(*r*) *Assignees of — v. —*, 2 Chit. Rep. 411.

(*s*) *Johnson v. Wardle*, 3 Dowl. 550; 1 Har. & W. 219, S. C.

(*t*) *Colebrook v. Dobbs*, 3 Burr. 1319.

(*u*) *Solomon v. Underhill*, 1 Camp. 229.

(*v*) *Burton v. Lawton*, 4 Camp. 163.

(*w*) See *Roberts v. Downes*, Barnes, 437: *Roberts v. Hillsborough*, Id. 438: *Bourne v. Church*, Id. 442: *Sellon v. Chamberlayne*, Id. 444: *Anon.*, 3 Taunt. 315.

the grounds stated for the application(*x*). A judge sitting at *Nisi Prius* at Westminster cannot make an order in a cause to be tried in London(*y*). It seems that the sheriff, under the Writ of Trial Act, has no power to postpone a cause, but the application must be made to a judge(*z*). The trial cannot, at least in the Common Pleas, be put off by the mere consent of the parties, unless sanctioned by the judge at *Nisi Prius*(*a*).

If the application be made at *Nisi Prius*, notice of the intended application, and a copy of the affidavit on which it is founded, should previously be given to the opposite party; which may have the effect of preventing his incurring the expense of bringing up his witnesses(*b*), if he do not intend to oppose the application; or, if he do oppose it, it affords him an opportunity of shewing cause against it in the first instance(*c*). The counsel's fee for moving is usually one guinea for a rule nisi, and the same or more for moving to make it absolute.

Notice to opposite Party.

The application must be founded on an affidavit stating the grounds upon which it is made. If made on account of the absence of a material witness, the affidavit, in ordinary cases, states the time issue was joined, the time for which notice of trial was given, the absence of the witness, and that the party cannot safely proceed to trial without him, the endeavours which have been made to find him, and the time at which he is expected to return(*d*). But, if the witness be abroad, or if, from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the above form will not, in general, be sufficient, and the court usually require that the affidavit shall state the cause of action, and the evidence expected from the witness, in order that they may judge if it be material, and that it also state circumstances from which they may infer the probability of the witness's return within a reasonable time(*e*). It is, in general, best, that the affidavit should state (if possible) when the witness is expected to return(*f*). In no case, however, is it necessary to state the name of the witness on account of whose absence the party cannot proceed to trial(*g*). Formerly, it seems, the affidavit must have been made by the party himself(*h*); but the affidavit of the attorney in the cause(*i*), and even the affidavit of the attorney's clerk, if it state that he is particularly acquainted with the circumstances of the cause, and has the management of it(*j*), has since been deemed sufficient. The affidavit, if made on the part of the defendant, need not swear to a good defence on the merits(*k*).

The Affidavit for.

(*x*) See R. H., 14 G. 2, Vol. I. 265: *Ansley v. Birch*, 3 Camp. 333: *Anon.*, 3 Taunt. 315.

(*y*) *Atkinson v. Dickinson*, 3 Camp. 41.

(*z*) *Packham v. Neuman*, 3 Dowl. 165; 1 C., M. & R. 584, S. C.

(*a*) See R. M., 50 G. 3, C. P.

(*b*) If no notice be given, or if not given until expense has been incurred by the opposite side, the applicant will have to pay that expense. (*Attorney-General v. Hull*, 2 Dowl. 111.)

(*c*) See form of notice, Chit. Forms, 614; and of affidavit, Id.

(*d*) See the form, Chit. Forms, 614.

(*e*) See *Rex v. D'Eon*, 3 Burr. 1513; 1 W. Bl. 510, S. C.: *Lord v. Cooke*, Id. 436.

(*f*) 1 Chit. Rep. 730 a.

(*g*) *Smith v. Dobson*, 2 D. & R. 420; *Buckingham v. Banks*, 4 D. & R. 832, n. But on a second application the court might be more strict; and they might not only require to know who he is, but what he is to prove, &c. (*Anon.*, 2 Chit. 686, n.)

(*h*) *Carter v. Uppington*, Barnes, 437.

(*i*) *Duberly v. Gunning*, Peake, 97.

(*j*) *Sullivan v. Magill*, 1 H. Bl. 637.

(*k*) *Attorney-General v. Hull*, 2 Dowl. 111; *Hill v. Prosser*, 3 Id. 704.

In deciding upon an application of this kind, the court will not, in general, enter into any inquiry as to the admissibility of the evidence required (l).

Costs.

Costs.] When the trial is thus put off, it is usually upon the terms of paying any costs the opposite party may have thereby been put to (m). And when the plaintiff sued as a pauper, and the defendant had the trial put off, upon undertaking to pay the costs of the day, the Court of Common Pleas granted an attachment against the defendant for the non-payment of these costs (n). The order for putting off the trial, when made at *Nisi Prius*, ought to be drawn up on the terms of the party who obtains it, *undertaking* to pay the costs of the day, otherwise there might be some doubt whether an attachment could be granted for not paying them. But, at all events, if drawn up generally on payment of costs, such payment being a condition precedent, if they be not paid, you may proceed to try the cause. The party gets these costs taxed upon the rule or order, in the usual way.

(l) See *Mackenzie v. Hudson*, 1 D. & R. 159. The costs are generally the same as if the record had been withdrawn.

(m) See *Walker v. Lawe*, 1 Gale, 52: (n) *Rice v. Brown*, 1 B. & P. 39: see *Attorney-General v. Hull*, 2 Dowl. 111. *Attorney-General v. Hull*, 2 Dowl. 111.

CHAPTER XXII.

TRIAL BY PROVISIO.

CHAP. XXII.

In what Cases.] IN all cases, where the plaintiff, after issue joined, does not proceed to trial, where, by the course and practice of the court, he ought to have done so, the defendant may, if he wish, have the action tried by proviso: that is, he may give the plaintiff notice of trial, make up the *Nisi Prius* record, carry it down and enter it with the marshal, and proceed to the trial as in ordinary cases (*a*). This, however, can be done only in cases where the plaintiff has been guilty of some laches or default after issue joined; except in replevin, prohibition, *quare impedit* (*b*), and error in fact (*c*), in which cases, both parties being actors, the defendant may make up the *Nisi Prius* record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The court have also allowed a defendant to carry down the record of an issue, directed by the Court of Chancery, to trial by proviso, upon its being suggested to them that the plaintiff wished to delay the cause (*d*). Where, upon a special jury cause being called on for trial, there was not a full special jury, and neither party prayed a *tales*, it was held that the defendant could not afterwards take down the record by proviso (*e*). The court have no right to interfere with defendants in ordinary cases, and prevent them from taking down a cause by proviso, for that is the mode by which it has been determined, that a plaintiff shall be prevented from keeping a cause hanging over the head of a party for an indefinite time (*f*).

As the delay and expense attending the trial by proviso, however, are material objections to this mode of proceeding, it is seldom adopted, unless in cases where the defendant is particularly anxious that the cause should be finally settled by verdict, and in some other cases specified in the next Chapter: in ordinary cases, the defendant usually moves for judgment as in case of a nonsuit, in preference to proceeding to trial by proviso. Seldom adopted.

When and how.] By rule of all the courts of *H.*, 2 *W.* 4, *r.* 71, “no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary” (*g*): and by When and how.

(*a*) After the issue has been joined, if the plaintiff, in causes in London or Middlesex, make default in trying it, or, in country causes, do not proceed to trial at the next assizes, the defendant may afterwards proceed to trial by proviso. (*R. M.*, 4 *A. c.*) As to the time within which the plaintiff ought to bring on the cause for trial, see *post*, 1072, 1073.

(*b*) *Reg. v. Banks*, 2 *Salk.* 652; 2 *Ld. Raym.* 1082, *S. C.*; and see *Smith v.*

Blundell, 1 *Chit. Rep.* 226; *Worcestershire Canal Company v. Trent Navigation Company*, 1 *Marsh.* 218.

(*c*) 2 *Saund.* 336 *a*.

(*d*) *Humpage v. Rowley*, 4 *T. R.* 767.

(*e*) *Phillips v. Lance*, 9 *B. & C.* 769.

(*f*) *Whittaker v. Mason*, 6 *Dowl.* 429; 5 *Scott*, 740; 4 *Bing. N. C.* 503, *S. C.*, per *Tindal, C. J.*

(*g*) See the former practice in the 6th edition of this work, pp. 1100, 1101.

BOOK IV.
PART I.

R. H., 2 *W.* 4, *r.* 70, "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso" (*h*).

Notice of
Trial.

The defendant must give the plaintiff the same *notice of trial* that the plaintiff is obliged to give him in ordinary cases (*see Vol. I.* 205); except that it is not necessary to give a term's notice, where no proceedings have been had in the cause for four terms, as in the case where the plaintiff takes down the record to trial (*i*).

Jury Process.

The jury process is the same as in ordinary cases; excepting that in the *distringas*, after the words, "many defaults," you insert this clause; "*Provided always, that if two writs shall come to you thereupon, then you execute and return one of them only; and have there*" &c. (*k*).

Proceedings
where Plain-
tiff also carries
down the
Record.

If both the plaintiff and the defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but, if he omit to do so, the defendant may proceed upon the record brought down by him (*l*). But, although the plaintiff have entered his record with the marshal, yet, if he have not given a sufficient notice of trial, his entry will be of no effect; the defendant, in that case, may proceed to trial upon the record he has taken down, and if the plaintiff do not appear to it, he must be nonsuited (*m*). And in all cases where the defendant proceeds upon his record, if the issue happen to be on the plaintiff, who is therefore to begin first, but does not appear, the defendant must not enter upon his proof and take a verdict; but the proper course is to call the plaintiff and nonsuit him (*n*). If, however, instead of doing so, he take a verdict, the court will not, in general, set it aside, except for the purpose of allowing a nonsuit to be entered instead of it (*o*).

(*h*) See the former practice: *Dodson v. Taylor*, 2 Str. 1055; *King v. Pippett*, 1 T. R. 695. In the Exchequer it was never necessary to enter the issue (*Coltsworth v. Martin*, 2 C. & J. 123); and it is now abolished in every case by *R. H.*, 4 *W.* 4. (*Hodges v. Diley*, 7 Dowl. 555).

(*i*) *Theobald v. Crickmore*, 2 B. & Ald. 594; 1 Chit. Rep. 317, S. C. See form of notice of trial, Chit. Forms, 615.

(*k*) See Chit. Forms, 615.

(*l*) *R. M.*, 4 A. c.: *Williams v. Jones, Barnes*, 29.

(*m*) *Brown v. Ottley*, 1 B. & Ald. 253.

(*n*) *Gardener v. Davis*, 1 Wils. 300; *Hicks v. Young, Barnes*, 458; 2 Saund. 336 b.

(*o*) *Hodgson v. Forster*, 1 B. & C. 110; 2 D. & R. 221, S. C.

CHAPTER XXIII.

COSTS FOR NOT PROCEEDING TO TRIAL.

CHAP. XXIII.

In what Cases.
Delay of the
Party.

In what Cases.] IF the plaintiff give notice of trial, and neither countermand his notice (*a*), nor proceed to trial in pursuance of it, the defendant, upon affidavit of attendance and necessary expenses, shall be entitled to his costs, to be taxed by the master (*b*); even although he have prevented the plaintiff from entering his cause for trial, by entering a *ne recipiatur* with the marshal (*c*). In like manner the plaintiff is entitled to costs if the defendant do not proceed to a trial by proviso after giving notice to that effect (*d*); and if both parties give notice of trial, and neither of them countermand their notice, or proceed to trial in pursuance of it, each of them is entitled to costs from the other (*e*); but neither of them is entitled to costs in such case if by consent of both parties the cause be made a *remanet* (*f*). Also, if the plaintiff do not proceed to execute his writ of inquiry in pursuance of his notice, or countermand it in time, the defendant will be entitled to his costs, in the same manner as for not proceeding to trial (*g*). It has been held, that the plaintiff is not excused from these costs by an offer to refer the cause made after the commission day (*h*). A pauper may be liable to these costs, though not dispaupered (*i*).

If the party be ready to try according to notice, but the cause be made a *remanet*, he will not be liable to pay costs, because the delay is not the delay of the party, but the delay of the court; and where the plaintiff was prepared to try at one sittings, but, from the press of business, the cause did not come on, and those sittings lasted till the second sittings commenced, but the plaintiff was obliged to withdraw his record on account of its not having been re-sealed, it was held, that he was not liable to the costs of the first sittings (*k*).

By *R. M.* 1654, s. 18, the defendant is entitled to costs if the plaintiff do not proceed to trial in pursuance of his notice, unless the plaintiff have countermanded his notice, or, "show cause to be allowed in the court in excuse of such costs." And the Court of Common Pleas refused the rule, where the plaintiff was prevented from going to trial by an accident which happened to a material witness (*l*). As the rule, however, is

Excuse of
such Costs.

- (*a*) *Whitlock v. Humphreys*, 2 Str. 849. Dowl. 86, S. C.
 (*b*) *Rex v. Mayor of Great Yarmouth*, 5 (*g*) *Ante*, 717: *Shadford v. Houstoun*,
 B. & Ald. 531; *R. M.*, 1654, s. 18; Q. B., 1 Str. 317: *Sutton v. Bryan*, 2 Str. 728.
 s. 18, C. P.; and see *R. M.*, 4 A. c.; (*h*) *Eaton v. Shuckborough*, 2 Dowl. 624,
 14 G. 2, c. 17, s. 5. Exch.
 (*c*) *Pr. Reg.* 406. (*i*) See *ante*, 920.
 (*d*) *Wilkinson v. Poole*, 2 Str. 797. (*k*) *Waters v. Weatherby*, 3 Dowl. 328:
 (*e*) *Pr. Reg.* 405: see *Clarke v. Simpson*, see *per Patteson, J.*
 4 Taunt. 591. (*l*) *Ogle v. Muffatt*, Barnes, 133; 5
 (*f*) *Blow v. Wyatt*, 4 M. & W. 407; 7 Taunt. 88.

BOOK IV.
PART I.

absolute in the first instance, the only way of bringing the matter of excuse under the consideration of the court, is by moving to discharge the rule.

When and
how obtained,
&c.

When and how Obtained, &c.] There is not any limited time within which the motion for these costs must be made, and in general it may be made at any time before execution executed, and perhaps afterwards (*m*). A term's notice is not necessary before the motion, though no proceedings have been had for four terms, that notice being only requisite where the object is to *speed the cause* (*n*).

After Motion
for Judgment
as in Case of
a Nonsuit.

By the *R. H.*, 2 *W.* 4, *r.* 69, "no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the *same* default, but such costs may be moved for separately, *i. e.* without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule." Therefore, if the defendant intends to move for judgment as in case of a nonsuit, he ought not to move for costs of the day until the former motion is disposed of. The court, on discharging the rule for judgment as in case of a nonsuit, on a peremptory undertaking, will, in general, grant the costs of not proceeding to trial as part of the rule (*o*); but not unless it appear by the affidavits that costs have been incurred (*p*). If the rule for judgment as in case of a nonsuit be made absolute, the costs of the day will not be granted as part of the rule; and in a case in the bail court, *Taunton, J.*, said, that those costs must be made the subject of a separate motion (*q*).

No Stay of
Proceedings.

Under peculiar circumstances, the court may make it part of the rule that the payment of the costs for not proceeding to trial shall be a condition precedent to ulterior proceedings; but, in ordinary cases, a stay of proceedings cannot be incorporated in a rule for costs for not proceeding to trial (*r*), and if not so expressed in the rule, the plaintiff may proceed without paying the costs, and the defendant's only remedy for them is by attachment, or by execution under the 1 & 2 *V. c.* 110, *s.* 18 (*s*).

How applied
for, and Pay-
ment enforced
in Q. B.
and Exch.

In the Queen's Bench and Exchequer, the mode of obtaining the costs by attachment is thus: *Let the defendant's attorney make an affidavit, stating when the action was commenced, issue joined, and notice of trial given, and that the plaintiff did not proceed to trial or countermand the notice* (*t*). Among fair practitioners, a notice of this motion is usually given (*u*), and the master will allow for it in costs; if given, the affidavit should state the service. Give this affidavit, with a motion paper, to counsel,

(*m*) *Redit v. Ludock*, 2 Dowl. 247.

(*n*) *French v. Burton*, 2 C. & J. 634.

(*o*) *Piercy v. Owen*, 1 Dowl. 362; *Len- niker v. Barr*, 2 C. & J. 473; *Dockett v. Read*, 1 Tyr. 386.

(*p*) *Ray v. Sharp*, 4 Dowl. 354.

(*q*) *Johnson v. Smith*, 1 Dowl. 421.

(*r*) *Eagar v. Cuthill*, 6 Dowl. 125; 3 M. & W. 60, *S. C.*; *Gibbs v. Goles*, 7 Dowl.

325.

(*s*) *Wilson v. Curtis*, 8 Bing. 374; *Doe Evans v. Roe*, 2 Dowl. 572.

(*t*) See the form, Chit. Forms, 616.

(*u*) A stay of proceedings cannot be had, although two days' notice of the motion be given. (*Eagar v. Cuthill*, 3 M. & Wels. 60).

"to move for costs for not proceeding to trial in pursuance of notice," and the Court of Queen's Bench will thereupon grant a rule absolute in the first instance.—In the Exchequer, the rule is not a rule absolute in the first instance, nor a rule *nisi* in the common form; but it is a rule, which, if cause is not shewn in four days, makes itself absolute without any motion for that purpose (r). Draw up the rule with one of the masters (y); and get an appointment on it from him. Serve a copy of the rule and appointment on the plaintiff's attorney, and afterwards attend before one of the masters, and have the costs taxed (z). Then let the defendant or his attorney serve a copy of the rule and allocatur on the plaintiff himself personally, and demand the costs; and if not paid, let the defendant and his attorney make an affidavit of the demand and refusal (a), and move thereon for an attachment. This rule for an attachment is absolute in the first instance. Draw it up with the master, and take it to one of the clerks in the Crown Office, who will make out the attachment. Take the writ to the sheriff's officer, and obtain a warrant thereon, and give the warrant to your officers to execute (b).

CHAP. XXIII.

In the Common Pleas, the mode of obtaining the costs by attachment is thus:—One of the masters will obtain this rule for you in the Treasury Chamber, or you may give a brief to a serjeant or counsel, and the court will thereupon grant a rule absolute in the first instance without affidavit. Draw up the rule with one of the masters, and get an appointment on it from him; serve a copy of the rule and appointment on the plaintiff's attorney, and afterwards attend before the master, and, upon producing the usual affidavit, he will tax the costs. Then let the defendant's attorney or agent serve a copy of the rule and allocatur on the plaintiff himself personally, (shewing to him at the same time the original rule), and demand the costs, and if not paid, let an affidavit be made of the demand and refusal, and move thereon for an attachment. This rule for the attachment is absolute in the first instance. Draw it up with one of the masters; engross the attachment on plain parchment, and get it signed by the master; get it sealed. The form of the writ is the same, mutatis mutandis, with the form in Chit. Forms, except that the memorandum at foot is thus: "In N. v. S. for non-payment of £——costs, taxed by Master W——, pursuant to a rule of court, dated the——day of——, 1840." It must bear teste in term, and be returnable on a day certain. Take the writ to the sheriff's office and obtain a warrant thereon, and give the warrant to your officer to execute.

How in C. P.

It would seem that, instead of issuing an attachment for these costs, you may proceed by execution on the rule of court, ordering them to be paid under the 1 & 2 V. c. 110, s. 18. As to this, see *post*, Chap. 33, title "*Motions and Rules.*" Sect. 3.

Execution for under 1 & 2 V. c. 110, s. 18.

As to obtaining costs against the lessor of the plaintiff in ejectment, see *ante*, 762.

(r) *Robinson v. Robinson*, 3 Dowl. 177: see *Raby v. Olerenshaw*, 11 Price, 512: *Eaton v. Shuckburgh*, 2 Dowl. 624.

(y) See the form, Chit. Forms, 616.

(z) See *Michinson v. Alcock*, 1 D. & R. 165.

(a) See the form, Chit. Forms, 592: and see *Rex v. Smithies*, 3 T. R. 351: *Wadham v. Brett*, 2 Wils. 227.

(b) As to the mode of proceeding by execution under 1 Vict. c. 110, see *post*, Chapter 34, s. 3.

CHAPTER XXIV.

JUDGMENT AS IN CASE OF A NONSUIT.

*In what Cases, 1070.**When obtained in Town Causes, 1072.**In Country Causes, 1074.**In Causes before the Sheriff, 1074.**The Motion, Rule, &c., 1075.**Default after peremptory Undertaking, 1079.*BOOK IV.
PART I.In what Cases.
Generally.

In what Cases.] BY statute 14 Geo. 2, c. 17, s. 1, where issue is joined (*a*), and the plaintiff shall neglect to bring such issue to *trial*, according to the course and practice of the court, then, it shall be lawful for the judges of the court, *upon motion made in open court*, (due notice having been given thereof), to give the same *judgment for the defendant as in cases of nonsuit*; unless, upon *just cause and reasonable terms*, they shall allow a further time for the trial of such issue; and if the plaintiff *neglect* to try the issue within the time so allowed, the court shall give such judgment as aforesaid. This statute extends to ejectment (*b*), and to *qui tam* actions (*c*), and to actions by executors or administrators (*d*), and to cases where default is made in not proceeding to trial before the sheriff under the 3 & 4 W. 4, c. 42 (*e*), and to cases where money is paid into court in respect of part of the causes of action, and taken out in satisfaction (*f*); but it does not extend to *replevin* (*g*); nor, it should seem, to prohibition, *quare impedit* (*h*), or error in fact; for in all these cases, the defendant may himself take down the record without a proviso (*i*). Nor does it extend, of course, to any case where the plaintiff could not be nonsuited if he had proceeded to trial (*k*). Nor to cases where the plaintiff can give a sufficient reason for not proceeding to trial (*l*), nor to causes which have abated by the death of one or more of the plaintiffs or otherwise (*m*). Though formerly doubtful, it is now settled that one of several defendants may obtain a rule for judgment as in case of a

When Issue
may be said
to be joined.

(*a*) Until the *similiter* is added, issue cannot be said to be joined (*Smith v. Rigby*, 3 Dowl. 705); and a *similiter* intitled in a wrong court has been holden insufficient for this purpose. (*Ray v. Good*, 5 Dowl. 295). It is not, however, necessary that the issue should have been actually made up and delivered; it is enough if the *similiter* has been delivered. (*Heath v. Borall*, 7 Dowl. 19). This judgment cannot be given unless issue has been joined the prescribed time, as to all the defendants who have pleaded. (*Crowther v. Duke*, 7 Dowl. 409).

(*b*) *Doe Berger v. Docker*, 6 Dowl. 479.
(*c*) *Stone v. Farey*, 1 East, 554; *Watson v. Jackson*, 1 Wils. 325.

(*d*) *Howard v. Ratbone*, Willes, 316; *Barnes*, 1130, S. C.; *Herbert v. Keal*, 4 D.

& R. 834; *Woolley v. Sloper*, 2 Dowl. 208; *Pickup v. Wharton*, 2 Dowl. 388.

(*e*) *Begbie v. Grenville*, 2 Dowl. 238; *Walls v. Redmayne*, Id. 508; *Maddoley v. Batty*, 3 Id. 205.

(*f*) *Doe Stanley v. Towgood*, 2 Dowl. 404.

(*g*) *Jones v. Concannen*, 3 T. R. 661; *Shortridge v. Hiern*, 5 Id. 400; *Eggleton v. Smith*, 1 W. Bl. 375.

(*h*) *Wyndoue v. Bishop of Carlisle*, 11 Moore, 269; 3 Bing. 404, S. C.

(*i*) *Ante*, 1065.

(*k*) *Weller v. Goyton*, 1 Burr. 358: see Vol. I. 313.

(*l*) *Monk v. Bonham*, 2 Dowl. 336; *Doe Steppins v. Lord*, Id. 419: *post*, 1076.

(*m*) *Cecchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243, S. C.

nonsuit, which will authorize a general judgment to be entered against plaintiff(*n*); and if one of two defendants suffer judgment by default, the other may have judgment as in case of a nonsuit, for the plaintiff may be nonsuited at the trial(*o*). Where there are several issues in law and in fact, and the defendant has judgment on the issues in law, if the plaintiff do not proceed on the issues in fact, the defendant shall have judgment as in case of a nonsuit; for the plaintiff in such a case might have been nonsuited, had he proceeded to trial(*p*); but pending the demurrer, the defendant cannot obtain judgment as in case of a nonsuit for not proceeding to trial on the issues in fact(*q*).

In all cases within the statute, if the plaintiff once comply with it, by taking down the issue for trial, although he be nonsuited, and the nonsuit be afterwards set aside(*r*), or although he have a verdict, and a new trial be afterwards granted(*s*), or although the parties agree to a reference, which by the default of the plaintiff turns out abortive(*t*), the defendant can never afterwards have judgment as in case of a nonsuit for any subsequent laches upon the part of the plaintiff in not bringing the cause to trial; but if he wish to dispose of the action, he must take it down for trial by *proviso*(*u*). So, in a country cause, if the cause be made a *remanet*(*x*), or in a town cause, if it be made a *remanet* at the request of the defendant(*y*), the defendant shall not afterwards have judgment as in case of a nonsuit; and this whether the plaintiff is passive, and takes no step, or gives a fresh notice of trial, which he abandons(*z*). But otherwise, in a town cause, where the cause is made a *remanet* from one sittings to another, by consent(*a*); for there is a great difference between causes entered for trial in London or Middlesex, and at the assizes in other counties; in the former, the record is not re-entered, nor is any fresh notice of trial given, and the cause comes on as if the sittings had been continued without interruption. So, if a town cause be made a *remanet* from the sittings after one term to the sittings after another term, and the plaintiff then make default, the defendant may have judgment as in case of a nonsuit(*b*). And giving notice that a cause will be taken as an undefended cause at the sittings in London, and appearing for the purpose of trying the cause as undefended, will not prevent the defendant from having such a judgment(*c*). And where the cause is not made a *remanet*, but the plaintiff, instead of allowing it to be tried, withdraws the record, the defendant may have judgment as in case of a nonsuit(*d*).

Where the Cause has been taken down for Trial.

(*n*) *Jones v. Gibson*, 5 B. & C. 768; 8 D. & R. 562, S. C.; and see *Murphy v. Donlan*, 5 B. & C. 178; 7 D. & R. 619, S. C.: ante, Vol. I. 314.

(*o*) *Murphy v. Donlan*, 5 B. & C. 178; 7 D. & R. 619, S. C.: *Stuart v. Rogers*, 7 Dowl. 185.

(*p*) *Parson v. Popham*, 10 East, 366.

(*q*) *Butcher v. Kierman*, 1 Marsh, 364.

(*r*) *King v. Pippett*, 1 T. R. 492; *Ashley v. Flaxman*, 2 Dowl. 697; *Doe Giles v. Wynne*, 1 Chit. Rep. 310; see *Henkyn v. Gerss*, 2 Camp. 408; 12 East, 248.

(*s*) *Porzelius v. Maddocks*, 1 H. Bl. 101; *Hawley v. Shirley*, 5 Dowl. 393; *Brough v. Scarby*, 2 Har. & W. 139.

(*t*) *Hansby v. Evans*, 4 M. & W. 565;

7 Dowl. 198, S. C.

(*u*) *Supra*, n. (*s*): and see *Corone v. Garment*, 1 Scott, 275: see, however, *Jones v. Pritchard*, 2 Tyr. 383.

(*x*) *Brown v. Rudd*, 1 Dowl. 371; *Mewburn v. Langley*, 3 T. R. 1; *Denman v. Bull*, 11 Moore, 443; 3 Bing. 499, S. C.: *Gilbert v. Kirkland*, 2 Dowl. P. C. 153.

(*y*) MS., E. 1820: post, 1072, n. (*f*).

(*z*) *Gilbert v. Kirkland*, 2 Dowl. 135: *Hawley v. Shirley*, 5 Dowl. 393.

(*a*) *Gadd v. Bennett*, 2 B. & Ald. 709.

(*b*) *Ham v. Greg*, 6 B. & C. 125; 9 D. & R. 125, S. C.

(*c*) *Edrupp v. Davies*, 1 Dowl. 552.

(*d*) *Burton v. Harrison*, 1 East, 346.

BOOK IV.
PART I.

Where the
Delay is not
caused by the
Plaintiff.

Where the defendant took out a summons for putting off a trial at the assizes, so late before the commission-day that the plaintiff thought he might be inconvenienced in getting ready for trial if the order was refused, and therefore countermanded it, the court held that the defendant could not, on that account, move for judgment as in case of a nonsuit(*e*). If notice of trial be countermanded at the request of the defendant, or if he otherwise prevent the plaintiff from going to trial, he cannot obtain judgment as in case of a nonsuit, for not proceeding to trial according to notice(*f*). And the defendant cannot rely, for the purpose of judgment as in case of a nonsuit, on a notice of trial which he has refused to accept(*g*). When the cause is delayed by the general course of business, the defendant cannot have this judgment; and where, in a special jury cause, upon being called on for trial, there was not a full special jury, and neither party prayed a *tales*, it was considered that the defendant could neither have a judgment as in case of a nonsuit, nor take down the record by proviso(*h*). And where a special jury cause had been set down for trial, and stood in the paper so long as three years, the defendant was refused a judgment as in case of a nonsuit, he not having made any application to have a day appointed for the trial(*i*). If the cause be abated by the death of one of the plaintiffs or otherwise, the defendant cannot afterwards have a judgment as in case of a nonsuit(*k*). Where the plaintiff has served a rule to discontinue, and the costs are taxed, but not paid, the defendant is not entitled to make the motion(*l*).

Where Costs
for not pro-
ceeding to
Trial have
been moved
for.

The *R. G. H.*, 2 *W.* 4, s. 69, orders that no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default; but if, after a motion for costs for not proceeding to trial, the plaintiff suffers another term or assizes(*m*) to elapse without giving notice of trial, this is a *new* default, and the defendant may move, notwithstanding the rule(*n*).

Not favoured.

It was observed by *Parke*, B., in a recent case, that he was not disposed to give any facility to these motions, which were very often more mischievous than otherwise(*o*).

When ob-
tained in
Town Causes.

When obtained in Town Causes.] The defendant is not entitled to judgment as in case of a nonsuit, by the above statute, until the plaintiff has failed to bring on the cause to trial within the time allowed him for that purpose by the practice of the court. The plaintiff is in no case obliged to give notice of trial until the term after that in which issue is joined (*Vol. I.* 207)(*p*); and, consequently, in *town* causes no motion can be made for judgment as in case of a nonsuit until two terms (of which when issue is joined in term time that in which issue is joined is counted as one)(*q*) have elapsed after

(*e*) *Rendell v. Bailey*, 2 Dowl. 113.

(*f*) *Jenkyns v. Charity*, 2 Dowl. 197: *ante*, 1071, n. (*y*): and see *Partridge v. Slater*, 5 Dowl. 68; *Watkins v. Giles*, 4 Dowl. 14. (*g*) *Clarke v. Goldsmid*, 5 Bing. N. C. 120.

(*h*) *Phillips v. Dance*, 9 B. & C. 769.

(*i*) *Rucker v. Ansley*, 2 Chit. Rep. 243.

(*k*) *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243, S. C.

(*l*) *Cooper v. Holloway*, 1 Hodges, 76.

(*m*) *Hyde v. Gardiner*, 1 Dowl. 380: *Tidd*, N. P. 465: but see *Moseley v. Clarke*, 2 Dowl. 66.

(*n*) *Dyke v. Edwards*, 2 Dowl. 53.

(*o*) *Harle v. Wilson*, 3 Dowl. 660.

(*p*) *Hall v. Buchanan*, 2 T. R. 734: and see R. H., 15 & 16, C. 2, r. 2: R. H., 20 & 21, C. 2. As to when issue may be said to be joined for this purpose, see *ante*, 1070, n. (*a*).

(*q*) *Pierson v. Chesham*, 6 Dowl. 507.

issue joined against all the defendants(*r*); *e.g.* if issue be joined in Michaelmas term, the motion may be made in Easter term, but not before(*s*). And if issue be joined in Hilary term, the motion may be made in Trinity term(*t*). And where issue is joined in vacation in a town cause, the defendant cannot move for judgment as in case of a nonsuit until the *third* term after issue joined: thus, if issue is joined in Trinity vacation, the motion cannot be made until the ensuing Easter term(*u*). But if the plaintiff have, in fact, given a sufficient notice of trial previously, and not proceeded to trial in pursuance of such notice(*x*), then, if the notice were given for a trial in the vacation, the defendant may move for the judgment in the following term(*y*); or if the notice were given for a trial in term, he may move in the term after, but not before(*z*); and this though the trial was to have been before the sheriff(*a*). When a town cause has been made a *remand* from the sittings after Easter term to the sittings after Trinity term, and the plaintiff has then made default, the defendant may move for judgment as in case of a nonsuit in the Michaelmas term following(*b*). Where a default in not proceeding to trial has been made by the plaintiff, the defendant will not be deprived of his right to move for judgment as in case of a nonsuit by the plaintiff's giving a fresh notice of trial before the motion is made(*c*). But if a plaintiff gives notice of trial for a sitting earlier than is necessary by the practice of the court, and he afterwards give another notice of trial for a later sitting, but which is still within due time, the defendant is not entitled to move for judgment as in case of a nonsuit, although the plaintiff had not proceeded to trial under his first notice, nor countermanded it(*d*). And the defendant cannot rely in support of his motion on an insufficient notice of trial which he has refused to accept(*e*). And an agreement to take no notice of trial is not equivalent to notice so as to entitle the defendant to judgment for not proceeding to trial(*f*). In a recent case in the Exchequer, a plaintiff having withdrawn the record in consequence of the absence of a witness, on a subsequent day gave a fresh notice of trial; prior to the day of trial under this second notice the defendant moved for judgment as in case of a nonsuit, having given one day's notice of motion only; the plaintiff tried the case as undefended, and obtained a verdict: it was held, that the verdict was an answer to the motion, but the court, on discharging the rule, set aside the verdict on payment of the costs thereof and the

(*r*) See *Crowther v. Duke*, 7 Dowl. 409.

(*s*) *Pierson v. Chesham*, 6 Dowl. 507.

(*t*) *Thomas v. Jones*, 7 Dowl. 712.

(*u*) *Gough v. White*, 2 M. & W. 363; *Heale v. Curtis*, 2 M. & W. 76; 5 Dowl. 294, S. C.; *Wyatt v. Howell*, 5 Dowl. 585.

(*x*) *Wingrove v. Hodson*, 2 Dowl. 379; *Munt v. Tremamondo*, 4 T. R. 557; *Gates v. Terry*, 1 Dowl. 370, S. C.; *Hay v. Howell*, 2 New Rep. 327; *Walter v. Buckle*, 2 Chit. Rep. 244; *Holah v. Fleet*, 1 Chit. Rep. 672.

(*y*) *Shepherd v. Taylor*, MS., H. T. 1834, C. P.; *Howell v. Powlett*, 1 Moo. & Scott, 355; 8 Bing. 272; 1 Dowl. 263, S. C.

(*z*) *Smith v. Templemore*, 5 Dowl. 408; *Isaac v. Goodman*, 2 Dowl. 34; 1 C. & M. 494, S. C.; *Marshall v. Foster*, 2 C. & M. 213; 2 Dowl. 213, S. C.; *Preedy v. Macfarlane*, Id.; 2 Dowl. 216, S. C.; *Begbie v. Grenville*, 2 Dowl. 238; *Lenney v. Poulter*, 3 Dowl. 650.

(*a*) *Maddoley v. Batty*, 3 Dowl. 205.

(*b*) *Ham v. Greg*, 6 B. & C. 125; 9 D. & R. 125, S. C.; *ante*, 1071.

(*c*) *Bainbridge v. Purvis*, 1 Dowl. 444; *Smedlie v. Christie*, 2 Id. 152.

(*d*) *Ranger v. Bligh*, 5 Dowl. 235.

(*e*) *Clark v. Goldsmid*, 5 Bing. N. C. 120; 7 Dowl. 151, S. C.

(*f*) *Downes v. Cross*, 2 C. & J. 466.

BOOK IV.
PART I.

costs of the rule, the plaintiff giving a peremptory undertaking(*g*).

In Country
Causes.

In Country Causes.] In *country* causes, if the issue be joined in an issuable term(*h*), and no notice of trial given for the next assizes, the defendant cannot move for judgment as in case of a nonsuit until after the plaintiff has failed to bring down the cause for trial at the second assizes. If it be joined in a non-issuable term, though no notice of trial was given for the next assizes, the motion may be made in the term next after those assizes(*i*). If it be joined in the vacation of a non-issuable term, and no notice of trial be given for the next assizes, it seems not to be settled at what time the judgment may be moved for. In *Williams v. Edwards*(*k*), the Court of Exchequer held that it might be moved for in the term after the next assizes. In *Robinson v. Taylor*(*l*), *Littledale, J.*, pronounced a similar decision. And in a late case(*m*), *Cole-ridge, J.*, held that it might be made in the term previous to the second assizes. But in *Harrison v. Williams*(*n*), *Williams, J.*, held that it could not be made in the term after the next assizes. And, considering that, in town causes where issue is joined in vacation, the motion cannot be made earlier than if it were joined in the following term(*o*), *Harrison v. Williams* seems to be the more correct decision. In *country* causes, in an issuable term, the rule should be moved for early in the term, or the court will perhaps enlarge it till next term, and not permit it to be discussed at chambers(*p*).

In Causes
before the
Sheriff.

In Causes before the Sheriff.] In causes to be tried before the *sheriff*, the time at which the plaintiff would be compelled to proceed by the court, will, it seems, be regulated by the times at which the sheriff sits(*q*). The rules, as to when this motion for judgment should be made, are the same in principle as those above mentioned. Where issue was joined in a *town* cause, in Hilary vacation, on the 2nd of February, and an order obtained on the 3rd to try before the sheriff, it was held, that it was too early to apply for judgment as in case of a nonsuit in the following Easter term, although several sheriff's court-days had passed since the order was obtained(*r*). Where issue was joined in a *country* cause before the sheriff in June, and no notice of trial was given, it was held, that the motion for judgment as in case of a nonsuit in Michaelmas term was too early, though two court-days had passed(*s*).

(*g*) *Jones v. Hows*, 5 Dowl. 600; 2 M. & W. 379. S. C.: see *Eager v. Cuthill*, 3 M. & W. 60.

(*h*) *Williams v. Davis*, 5 Bing. N. C. 227; 7 Dowl. 246, S. C.: *Miller v. Hassall*, M.S., T. T. 1828: *Simonds v. Folkenham*, 1 Dowl. 292; 1 C. & J. 513; 1 Tyr. 501, S. C.: *Redward v. Way*, 13 Price, 453; *Crowley v. Dean*, 1 C. & J. 18; *Spiers v. Parker*, Id. n.: *Prentice v. Blott*, 2 Bing. 360; 9 Moore, 687, S. C.

(*i*) *Heath v. Bozall*, 7 Dowl. 19: *Robinson v. Taylor*, 5 Dowl. 518: *Evans v. Barnard*, 3 M. & W. 276: *Williams v. Edwards*, 3 Dowl. 183; 1 C., M. & R. 583, S. C.: *Smith v. Rigby*, 3 Dowl. 705: see *Apperley v. Morse*, 6 Dowl. 505: *Williams*

v. Davis, 5 Bing. N. C. 227; 7 Dowl. 246, S. C. The decision in *Smith v. Miller*, 3 M. & W. 60, is founded on some mistake of the officer, per *Parke, B.*, in *Evans v. Barnard*, *supra*.

(*k*) 1 C., M. & R. 583; 3 Dowl. 183, S. C.

(*l*) 5 Dowl. 518.

(*m*) *Lister v. Ventom*, 7 Dowl. 691.

(*n*) 6 Dowl. 772.

(*o*) See *Gough v. White*, 2 M. & W. 363: *Heale v. Curtis*, 2 M. & W. 76.

(*p*) *Tidd*, 502, 765.

(*q*) *Banks v. Wright*, 3 Dowl. 14.

(*r*) *Stacey v. Jeffreys*, 5 Dowl. 524: and see *Fox v. McCulloch*, Id. 526.

(*s*) *Butterworth v. Crabtree*, 3 Dowl. 184: *Harle v. Wilson*, Id. 658.

But, in a *town* cause, where issue was joined in Easter term, and notice of trial was given for the sittings after that term, and an order for a writ of trial obtained the same day, but no notice of trial before the sheriff was given, a rule for judgment as in case of a nonsuit was granted on application in Trinity term (*t*). Where notice of trial is given for a day in term, and default made, the motion cannot be made in the same term (*u*). Where a rule *nisi* for judgment as in case of a nonsuit was discharged on a peremptory undertaking to try at the next assizes, and afterwards an order to try at the sheriff's court, and to relieve the plaintiff from the undertaking, was obtained, and the plaintiff neglected to try at the next sheriff's court, the Court of Exchequer held, that the effect of the order was merely to substitute the sheriff's court for the assizes, and that the defendant was entitled to a rule absolute in the first instance (*v*). As to what steps the plaintiff is bound to take on a peremptory undertaking to try at the sheriff's court, see *post*, 1079.

The Motion, Rule, &c.] In order to obtain judgment as in case of a nonsuit, *you must make an affidavit of the state of the cause, shewing that issue has been joined* (*x*), *and the plaintiff's default* (*y*). An affidavit, merely stating that a rule to reply was duly given, that the plaintiff accordingly replied, and that the cause was "thereby" at issue, is not sufficient (*z*). An affidavit, not stating that issue had been joined, but stating that notice of trial had been given, has been held to be sufficient (*a*). *If the motion be made in the next term after issue is joined, the affidavit must state that notice of trial was given, and that the plaintiff had not proceeded to trial in pursuance of his notice.* If it be intended to apply for costs of the day, in case of the rule being discharged upon a peremptory undertaking, the affidavit should also shew that the notice of trial was not countermanded in due time, and the costs incurred (*b*). *Give a motion-paper with this affidavit to counsel, to move for a rule nisi. Draw up your rule with one of the masters* (*c*); *serve a copy of it on the plaintiff's attorney or agent, and make an affidavit of the service. And afterwards, on the day after that appointed by the rule, give a motion-paper to counsel, to move to make the rule absolute upon this affidavit of service.* It is, in general, advisable, however, in a country cause, not to move to make the rule absolute until three or four days after the day appointed to shew cause (*d*). The statute 14 G. 2, c. 17, s. 1, requires that *notice be given of the motion*: in the Queen's Bench the rule *nisi* was, of itself, formerly considered a notice (*e*), but it was not so in the Com-

The Motion,
Rule, Affida-
vit, &c.

(*t*) *Mullins v. Bishop*, 2 Dowl. 557.

(*u*) *Lenney v. Poulter*, 3 Dowl. 650 : and see *Begbie v. Grenville*, 2 Id. 238: *Harle v. Wilson*, 3 Id. 658: *Horwood v. Roberts*, 2 Id. 534.

(*v*) *Williams v. Edwards*, 3 Dowl. 660: see *Sell v. Adams*, 7 Dowl. 672: *post*, 1079.

(*x*) *Gilmore v. Melton*, 2 Dowl. 632: *Brown v. Kennedy*, Id. 639: *Seabrook v. Cave*, Id. 691. As to when issue may be said to be joined, see 1070, n. (*a*).

(*y*) See the form, Chit. Forms, 617.

(*z*) *Smith v. Parsloe*, 1 Dowl. 308; 2 C.

& J. 217, S. C.: and see *Gilmore v. Melton*, 2 Dowl. 632: *Smith v. Rigby*, 3 Dowl. 705.

(*a*) *Corbyn v. Heynworth*, 5 Scott, 335; 6 Dowl. 181: but this seems questionable, considering that notice of trial may be given on pleadings concluding to the country, before issue is actually joined. (See *Smith v. Rigby*, 3 Dowl. 705).

(*b*) See *Ray v. Sharp*, 4 Dowl. 354.

(*c*) See the form, Chit. Forms, 618.

(*d*) Chit. Sum. Prac. 108, 166.

(*e*) *Anon.*, Lofft, 265.

BOOK IV.
PART I.

mon Pleas or Exchequer (*f*); and now by rule of all the courts of *H. T.*, 2 *W. 4*, *r. 68*, "a rule *nisi* for judgment as in case of a nonsuit may be obtained on motion, without previous notice; but, in that case, it shall not operate as a stay of proceedings;" and, in most cases, therefore, it is advisable to give it. In the Exchequer, the notice, to operate as a stay of proceedings, must be given two days previously to the motion (*g*). A rule to take out of court money paid in, under the 7 & 8 *G. 4*, *c. 71*, cannot be incorporated with a rule for judgment as in case of a nonsuit (*h*).

Not granted at Chambers.

It will be observed, that the statute admitting of this motion directs it to be made "in open court" (*i*); and it seems that a judge at chambers has no power to entertain it (*j*).

Term's Notice unnecessary.

The general rule, so often noticed in the course of this Work, which requires a *term's notice* of proceeding, where no proceedings have been had in the cause within four terms, does not extend to motions for judgment as in case of a nonsuit (*k*); and it is no objection to the motion that issue was joined several years previously (*l*).

Entry of Issue unnecessary.

Formerly, the defendant was not entitled to judgment as in case of a nonsuit, until after the issue was entered of record; but now, by rule of *H. T.*, 2 *W. 4*, *r. 1*, *s. 70*, "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit."

The Rule.

The court, however, instead of making the rule absolute, may either discharge the rule unconditionally, or, "upon just cause *and* reasonable terms," allow a further time for the trial of the issue (*m*).

When discharged unconditionally.

If the defendant be not entitled to the rule, it will, of course, be discharged unconditionally, and, in general, with costs. Thus, it will be discharged unconditionally where issue has not been joined, (*ante*, 1070, &c.), or where the application is made too soon, (*ante*, 1072, &c.), or where the case has been already taken down to trial by the plaintiff, (*ante*, 1071, &c.), or where the plaintiff has been restrained by injunction (*n*), or where the cause has been delayed by the general course of business, (*ante*, 1072, &c.), or where the defendant who applies has prevented the plaintiff from going down to trial, (*ante*, 1072, &c.), or has given a *cognovit* (*o*). And where it appeared that the bill on which the action was brought had been paid meanwhile by a third party, *Bayley*, B., discharged the rule (*p*). But the court have refused to discharge the rule unconditionally, on the ground that the tenant of defendant (who defended as landlord) in ejectment had delivered possession to the lessor of the plaintiff, the landlord not being privy to the transaction (*q*). And the

(*f*) *Gooch v. Pearson*, 1 H. Bl. 527; Tidd, 9th ed. 491, 765; *Coulstwith v. Martin*, 2 C. & J. 123; Dax, Prac. 70, 76.

(*g*) *Hannah v. Wyman*, 3 Dowl. 673; see *Jones v. Howe*, 2 M. & W. 379; 5 Dowl. 600, S. C.; and see *Eagar v. Cut-hill*, 3 M. & W. 60.

(*h*) *De Bedolliere v. Ryan*, 7 Dowl. 615.

(*i*) See *ante*, Vol. I. p. 8: 2 Inst. 103.

(*j*) But see *Doe More v. Savage*, (5 Dowl. 507), in which a rule to make a judge's order for judgment as in case of a nonsuit, a rule of court, was held absolute in the first instance. Probably the order in that case was made by consent.

(*k*) *Shinfield v. Saxton*, 2 Dowl. 778; 4 Moo. & Scott, 187, S. C.; *Doe Phillips v. Moses*, 5 T. R. 634; *Manby v. Wortley*, 2 W. Bl. 1223; *Hockin v. Reece*, 2 Y. & J. 275: *ante*, Vol. I. 210.

(*l*) *Cromer v. Brown*, 4 Dowl. 288, seven years; *Curtis v. Tabram*, 4 Dowl. 600, eight years.

(*m*) *Vide ante*, 1070.

(*n*) *Anon.*, 1 Chit. 280, n.

(*o*) *Smith v. Joy*, 2 Dowl. 410.

(*p*) *Monk v. Bonham*, 2 C. & M. 430; 2 Dowl. 336, S. C.

(*q*) *Doe v. Dyer*, 3 Dowl. 696; see 1 Gale, 46.

insolvency of the plaintiff after action brought is no answer to the motion (*r*). Nor is it a sufficient answer that plaintiff's attorney had acted without authority in bringing the action (*s*), but in one such case the court enlarged the rule for judgment, and granted a rule *nisi* for payment of costs by the attorney (*t*).

CHAP. XXIV.

As to the "just cause and reasonable terms" on which the rule will be discharged, where the defendant would otherwise be entitled to judgment as in case of a nonsuit, the court usually discharge the rule upon the plaintiff's *undertaking peremptorily to try the cause* at the next sittings or assizes, or, if it appear that he cannot (from the peculiar circumstances of the case) bring on the trial at that time, at some subsequent sittings or assizes (*u*); but, where the justice of the case requires it, the court will add to this such other terms as they may think reasonable (*v*). Besides the undertaking here mentioned, however, the plaintiff must shew the court "just cause" for his not having proceeded to trial, and this must be by affidavit, and the excuse must be such as to satisfy the court that the plaintiff's not having proceeded to trial arose, not from any wish upon his part to delay the trial of the issue unnecessarily, or for the purpose of vexation (*w*), or from any other improper motive (*x*), but from necessity, or from some other just cause (*x*). Unless *some* excuse be given for the default, the defendant must have judgment, and he is not bound to accept a peremptory undertaking (*y*). The absence of a material witness, or, perhaps, want of documentary evidence, is sufficient cause (*z*); so is withdrawing the record, in order to obtain a special jury (*a*); and where the plaintiff, in a *qui tam* action, withdrew the record, because his principal witness refused to give evidence, for fear of subjecting himself to a penalty for the same transaction, the court allowed it to be a sufficient excuse; although it appeared that the time limited for bringing any action against the witness would not expire for three terms, and that the plaintiff could not proceed to trial until after the expiration of that time (*b*). So, where plaintiff's attorney was prevented from proceeding to trial by a domestic affliction (*c*). So, the insolvency of the defendant, not discovered until after action brought, is deemed a sufficient excuse; and the court, usually, in such a case, give the defendant his option of a *stet processus*, (if the plaintiff be willing to give it), or to have his rule discharged with costs (*d*). And this was

When discharged upon just Cause and reasonable Terms.

(*r*) *Frodsham v. Rust*, 4 Dowl. 90.

(*s*) *Barber v. Wilkins*, 5 Dowl. 305.

(*t*) *Munday v. Newman*, 5 Dowl. 695.

(*u*) See *Hacher v. Hardy*, 1 Chit. Rep. 280, n.: *Raynes v. Spicer*, 7 T. R. 178: *Gardner v. Moses*, 1 Taunt. 118.

(*v*) Thus where the plaintiff was insolvent, and the action was carried on for the benefit of his creditors, the court compelled him to give security for costs. (*Nicholson v. Wane*, 1 Harr. & W. 211). See *Taylor v. Mountague*, 2 M. & W. 315, where the assignees refused to go on with the action.

(*w*) See *Allingill v. Pearson*, 1 B. & P. 103, where the court made the rule absolute because the defendant had behaved vexatiously and unfairly in the course of the suit.

(*x*) See *Walter v. Buckle*, 2 Chit. Rep. 244: *Nicholls v. Collingwood*, 2 Dowl. 60:

but see *Stone v. Farey*, 1 East, 554.

(*y*) *Nicholls v. Collingwood*, 2 Dowl. 60.

(*z*) See *Jones v. Stephenson*, Barnes,

316: *Jordan v. Martin*, 8 Taunt. 104: *Bunyan v. Yerbury*, 1 D. & R. 448: *Greenhill v. Mitchell*, 6 Taunt. 150: see *Allingill v. Pearson*, 1 B. & P. 103, *per* C. J. The affidavit in support of the application need not, in general, name the witness. (*Montfort v. Bond*, 2 Dowl. 403).

(*a*) *Webber v. Roe*, 3 Dowl. 589.

(*b*) *Raynes v. Spicer*, 7 T. R. 178: *sed vide* *Bunyan v. Yerbury*, 1 D. & R. 448. There seems to be no difference in this respect between penal and other actions. (See *per* Lord Kenyon, C.J., *Stone v. Farey*, 1 East, 554).

(*c*) *Weak v. Calloway*, 7 Price, 531.

(*d*) *Smith v. Badcock*, 5 Dowl. 91. See the form of entry of *stet processus*, Chit. Forms, 618.

BOOK IV.
PART I.

done, in one case, though it did not appear that the plaintiff was unaware of the insolvency when he brought the action (*e*). The court have even allowed it to be a sufficient excuse, that the attorney was not enabled to prepare briefs for counsel, on account of the plaintiff's absence (*f*); but it is not a sufficient excuse that the attorney withdrew the record because the plaintiff was poor, and had promised to supply him with money, which he failed to do, in consequence of a permanent insolvency (*g*): yet where the plaintiff was only temporarily out of funds, and expected to be in funds within a definite period, the excuse was held sufficient to discharge the rule on a peremptory undertaking (*h*). Where the plaintiff became bankrupt after issue joined, and the assignees refused to proceed with the suit, the court refused to discharge the rule on a peremptory undertaking, unless security for costs were also given (*i*). And the same where the plaintiff was insolvent, and the action was carried on for the benefit of his creditors (*k*). It has been held to be a good excuse, even after an undertaking, that another action is pending, and in the new trial-paper, for argument, which will decide the point in dispute (*l*), and, in such a case, the affidavit must state the name of the cause, and shew that the point in dispute in both actions is the same (*m*). The court are, in general, more strict in this respect, where notice of trial has been given, than in other cases. *It is usual for the plaintiff's counsel to shew his affidavit to the counsel for the defendant; and if the latter be satisfied with the excuse stated in the affidavit, he may consent to the rule being discharged, upon the peremptory undertaking above mentioned; the briefs may be indorsed accordingly, and handed to one of the masters (n).*

Rule not
opened for
Falsehood in
Affidavit, &c.

If the rule *nisi* is discharged on an affidavit of an excuse which is false in fact, the court will not afterwards open the matter upon disproof of the contents of such affidavit; although, had they seen reason to doubt the truth of it at the time of shewing cause, they would have suspended their judgment until the matter was examined into (*o*).

Rule, how
drawn up and
Judgment
signed, &c.

The rule for judgment as in case of a nonsuit is discharged either unconditionally or upon the peremptory undertaking above mentioned, or made absolute (*p*). If made absolute, let the defendant draw up the rule with one of the masters (*q*). *Then bespeak the roll, in order that the master may mark the costs. Judgment being signed, you may sue out execution (r).*

Costs of the
Day when
Part of the
Rule.

The court, in discharging the rule for judgment as in case of a nonsuit, on a peremptory undertaking, may order the plaintiff to pay the costs of not proceeding to trial, provided they be sworn to in the affidavit (*s*), but the payment of such costs cannot be made a condition of discharging the

- (*e*) *Lemon v. Hopson*, 6 Dowl. 795.
 (*f*) *Stone v. Farey*, 1 East, 554: see *Wynn v. Bellman*, 6 Taunt. 122.
 (*g*) *Cleasby v. Poole*, 3 Dowl. 162; 1 C., M. & R. 521, S. C. In *Radford v. Smith*, 7 Dowl. 26, Parke, B., said, that the insolvency of the plaintiff in *Cleasby v. Poole*, was a permanent one.
 (*h*) *Radford v. Smith*, 4 M. & W. 100; 7 Dowl. 26.
 (*i*) *Taylor v. Montague*, 2 M. & W. 315.
 (*k*) *Nicholson v. Warne*, 1 H. & W. 211.
 (*l*) *De Rutzen v. Richards*, 1 Har. & W. 110: and see *Wynn v. Bellman*, 6 Taunt. 122.
 (*m*) See *Wynn v. Bellman*, 6 Taunt. 122.
 (*n*) See form of rule for discharging it on a peremptory undertaking, Chit. Forms, 618.
 (*o*) *Davies v. Cottle*, 3 T. R. 405.
 (*p*) See form, Chit. Forms, 618.
 (*q*) *Ibid*.
 (*r*) See the form of judgment, Chit. Forms, 619.
 (*s*) *Ray v. Sharp*, 4 Dowl. 354.

rule(*t*). The rule of *H., 2 W. 4, s. 69*, does not give the court any express power to grant the defendant the costs of the day, when the rule is made *absolute*; and in one such case in the Court of Queen's Bench, *Taunton, J.*, said, that those costs must be made the subject of a separate motion(*u*). CHAP. XXIV.

Default after Peremptory Undertaking.] If the rule be discharged upon a peremptory undertaking, the plaintiff must proceed to trial accordingly, and of which trial he must give a fresh notice(*r*). And where the plaintiff gives an undertaking to try at the next practicable sheriff's court, he is bound to take proper steps to try the cause before the defendant obtains judgment as in case of a nonsuit, though for that purpose it be necessary to obtain a special appointment of a court by the sheriff(*x*). If the plaintiff neglect to proceed to trial in pursuance of such undertaking, let the defendant's attorney make an affidavit of the fact(*y*), and give this with a motion paper to counsel, to move for judgment as in case of a nonsuit, for not proceeding to trial in pursuance of a peremptory undertaking; and the court will thereupon grant a rule *absolute*(*z*). In the Common Pleas(*a*) and Exchequer(*b*), the rule is also *absolute* in the first instance. When you have obtained the rule, sign judgment, as above directed, and sue out execution. Default after peremptory Undertaking.

If, however, the plaintiff have been prevented by circumstances from proceeding to trial in pursuance of his undertaking, he must, if possible, before the defendant has moved for judgment, as above mentioned, make an application to the court to discharge or to enlarge the peremptory undertaking given in the cause, and for liberty to try at a future sitting or assizes, upon an affidavit of the facts; upon which, if sufficient, the court will grant a rule *nisi* accordingly. If the defendant's rule for judgment be actually drawn up, the plaintiff may and should move at the same time that the defendant's rule be discharged(*c*). The application should be made as early as possible, for, if the defendant's rule be made absolute, it seems that it will not be discharged under circumstances which would have entitled the plaintiff to an enlargement of the undertaking, had he applied in time(*d*). Payment of debt and costs by the defendant, after the giving of the peremptory undertaking, is a good ground for moving to discharge it, and the court, in such a case, cannot compel the plaintiff to enter a *stet processus*(*e*). And, where plaintiff was under a peremptory undertaking to try at a certain assizes, Enlargement, Discharge, &c. of peremptory Undertaking.

(*t*) *R. H., 2 W. 4, s. 69: Johnson v. Smith, 1 Dowl. 421; see Piercy v. Owen, 1 Dowl. 362; Lenniker v. Barr, Id. 563; 2 C. & J. 473, S. C.: Dockett v. Read, 1 Tyr. 386.*

(*u*) See ante, 1078, n. (*t*).

(*v*) *Salsh v. Cranbrook, 1 Dowl. 148; Bainbridge v. Purvis, Id. 444.* Where the rule was discharged on a peremptory undertaking to try at the next assizes, and afterwards an order for trial at the sheriff's court was obtained, and the plaintiff neglected to try at the next sheriff's court: it was held, that the defendant was entitled to a rule absolute for judgment as in case of a nonsuit. (*Williams v. Edwards, 3 Dowl. 660.*)

(*x*) *Sell v. Adams, 7 Dowl. 672; see Williams v. Edwards, 3 Dowl. 660.*

(*y*) See the forms, *Chit. Forms, 619.*

(*z*) In *Vokins v. Snell, 2 Dowl. 411, Littledale, J.*, decided, that the rule was *nisi* when the undertaking was given without a rule of court; but if the undertaking were given under the authority of a rule of court, the rule would be absolute in the first instance. (*Willis v. Oakley, 6 Dowl. 766; 9 Price, 389.*)

(*a*) *R. H. 1838; 4 Bing. N. C. 365.*

(*b*) *9 Price, 389.*

(*c*) *Charrington v. Meutheringham, 4 Dowl. 479; see Haines v. Taylor, 2 Dowl. 644.*

(*d*) *Seeper Coleridge, J., Ward v. Turner, 4 Dowl. 22; and see Haines v. Taylor, 2 Dowl. 644.*

(*e*) *Shrimpton v. Carter, 3 Dowl. 648.*

BOOK IV.
PART I.

and after that assizes, and before the next term, both parties agreed to a reference, and the arbitrator made no award, it was held, that the agreement of reference was a waiver of the peremptory undertaking, and a rule for judgment as in case of a nonsuit was discharged on a fresh undertaking(*f*). And the absence of all but one of a special jury, in a cause which ought apparently to be tried by a special jury, has been deemed a good excuse for not proceeding to trial in pursuance of a peremptory undertaking(*g*). So, the absence of a material witness is a good excuse(*h*), and in such case, if it be the *first* default, the affidavit in support of the motion to enlarge the rule need not state the name of the witness(*i*). So, the arrest of the plaintiff, who conducted his cause in person, by which he was prevented from attending to try, and the cause called on and struck out of the paper(*k*). So, the absconding of the plaintiff's attorney, by which the trial was prevented(*l*). So, that in consequence of several other causes having been referred, the cause was called on unexpectedly, at a time when the parties were unprepared(*m*). So, that the plaintiff deferred proceeding, in order to await the decision of a similar question in another cause; (and in such a case the question raised, and the action in which it arises, should be stated in the affidavit(*n*). Also, where a plaintiff, under a peremptory undertaking to try, set down his cause for trial at a certain sittings, at which there was no prospect of its being tried, his not having carried in the record to the marshal's office was deemed not sufficient to entitle the defendant to judgment as in a case of a nonsuit(*o*). And it seems that, in general, if the plaintiff has done his best to perform his undertaking, but fails, in consequence of unavoidable accident, or from some delay, arising out of the general course of business, and the application is made in proper time(*p*), the undertaking will be enlarged(*q*); but, where the cause of the plaintiff's not proceeding to trial was, that his principal witness was afraid that his evidence might be injurious to him in a matter then before the House of Lords, the court refused to enlarge the undertaking(*r*). And where the plaintiff neglected to go to trial because it was supposed that his declaration required amendment, and a proposal to refer was going on, the Court of Exchequer discharged a rule for setting aside a rule for judgment as in case of a nonsuit, and enlarging the undertaking(*s*).

Costs of En-
largement.

The application to enlarge a peremptory undertaking, being an application to the discretion and favour of the court, will be granted only on payment of costs by the plaintiff(*t*); and, after the first default, the payment of costs will be made a condition precedent to enlarging the undertaking(*u*).

(*f*) *Spurr v. Rayner*, 7 Dowl. 467.(*g*) *Master v. Milner*, 1 Bing. 70; 7 Moore, 367, S. C.: see *Phillips v. Dance*, 9 B. & C. 769.(*h*) *Phillips v. Dance*, 9 B. & C. 769.(*i*) *Montfort v. Bond*, 2 Dowl. 403.(*k*) *Pitt v. Evans*, 2 Dowl. 226.(*l*) *Bolcot v. Hughes*, 1 Chit. Rep. 279.(*m*) *Saxon v. Swabey*, 4 Dowl. 105.(*n*) *De Rutzen v. Richards*, 1 Harr. & W. 110; *Wynn v. Bellman*, 6 Taunt. 122.(*o*) *Cope v. Holt*, 1 D. & R. 180.(*p*) See *per Coleridge, J.*, *Ward v. Turner*, 4 Dowl. 22.(*q*) *Saxon v. Swabey*, 4 Dowl. 105, and the cases above cited: see *De Rutzen v. John*, 5 Dowl. 400, where the undertaking was enlarged five times.(*r*) *Muston v. Tabard*, 2 H. & W. 138.(*s*) *Haines v. Taylor*, 2 Dowl. 644.(*t*) *Percival v. Bird*, 4 Dowl. 748.(*u*) *Dennehaye v. Richardson*, 4 Dowl. 564: see *De Rutzen v. John*, 5 Dowl. 400.

CHAPTER XXV.

NOLLE PROSEQUI, RETRAXIT.

CHAP. XXV.

A NOLLE PROSEQUI is in the nature of an acknowledgment or undertaking by the plaintiff to forbear to proceed any further, either in the suit altogether, or as to some part of it, or as to some of the defendants; but if entered as to part of the suit only, or as to some of the defendants, he is at liberty to proceed as to the rest (*a*). A *nolle prosequi* is different from a *nonpros*, for there the plaintiff is put out of court with respect to all the defendants (*b*). If the *nolle prosequi* be entered *before judgment*, the plaintiff may afterwards bring another action for the same cause; but if entered *after judgment*, it operates as a *retraxit*, and bars any future action for the same cause (*c*).

What it is.

To the whole Declaration, &c.] If the plaintiff misconceive his action, or make a mistake as to the party sued, (as where he sues a *feme covert*, and she pleads coverture in bar (*d*), or where he discovers that the defendant is an infant, and the action is not for necessaries, or the like), he may enter a *nolle prosequi* as to the whole cause of action (*e*), and proceed *de novo* in another action.

To the whole Declaration, &c.

To some of several Counts, &c.] Where the defendant pleads one plea to the whole declaration, and that plea happens to be a complete bar to one or more of the counts, but not to others, the plaintiff may enter a *nolle prosequi* as to the counts to which the plea is a bar. Thus, where *assumpsit* is brought for goods sold &c., and upon an account stated, and infancy is pleaded to the whole of the declaration, the plaintiff may enter a *nolle prosequi* as to the count upon an account stated, (no action upon an account stated lying against an infant), and reply as to the other counts (*f*). In a case decided before the recent rules prohibiting the insertion of several counts upon the same cause of action, where the declaration in debt consisted of one special and several general counts; and to the special count there were several special pleas, and to the general counts the general issue, the plaintiff having entered a *nolle prosequi* on the special count, and joined issue on the others; it was held that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count, and the pleas pleaded thereto (*g*).

To some of several Counts, &c.

(*a*) 1 Saund. 207 b, c.(*b*) *Philpot v. Muller*, 1 Doug. 169, n.(*c*) *Cooper v. Tiffin*, 3 T. R. 511: *Bowden v. Horne*, 7 Bing. 716; 5 Moo. & P. 756, S. C.(*d*) *Cooper v. Tiffin*, 3 T. R. 511.(*e*) See the form of the entry, Chit. Forms, 620.(*f*) 1 Saund. 207 b.(*g*) *Hayward v. Kain*, 1 M. & M. 311.

BOOK IV.
PART I.Where the
Defendant
demurs.

But where there is a demurrer to a whole declaration, the plaintiff will not, in general, be allowed to rectify his error by entering a *nolle prosequi* as to some of the counts (*h*), or to any particular objectionable part of the declaration (*i*): thus, where there was a demurrer to a declaration against two defendants, because one of them was not named in one of the counts, the court held that the plaintiff could not enter a *nolle prosequi* as to that count, and proceed on the others (*k*). So, where there was a demurrer to a declaration for a misjoinder of counts, the court held that the plaintiff could not rectify his mistake by entering a *nolle prosequi* as to some of the counts (*l*). But if the defendant demur or plead separately to several counts, the plaintiff may enter a *nolle prosequi* as to some of the counts, and proceed to trial or argument on the others (*m*). If the defendant plead to one count and demur to another, the plaintiff, if he have judgment on the demurrer, and be content to take damages upon that judgment only, may in general execute a writ of inquiry as to it, or, in case of a bill of exchange or the like, may have it referred to the master, and may enter a *nolle prosequi* as to the issue in fact (*n*).

Where, in an action of trespass and assault, the defendant pleaded, first, not guilty; and, secondly, a justification; the plaintiff replied, joining issue on the two pleas, and new assigning: the defendant having demurred to the replication and new assignment, the plaintiff went down to trial, and obtained a verdict for 15*l*. damages on the first issue; after which the plaintiff entered a *nolle prosequi* to the new assignment, and gave the defendant judgment on demurrer: the court, under these circumstances, set aside the *nolle prosequi* (*o*).

To Part of a
Count.

To Part of a Count.] The plaintiff may enter a *nolle prosequi* as to part of a count. Thus, in trespass, where the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a *nolle prosequi* as to the hay and grass, and proceed for the taking of the corn (*p*).

As to some
of several
Defendants.

As to some of several Defendants.] In actions upon *contracts* against several defendants, if the defendants join or sever in their pleas, the plaintiff cannot enter a *nolle prosequi* as to any one of them, without releasing the others (*q*); but if they *sever* in their pleas, and one of them plead his bankruptcy, *ne unques* executor, or any other matter in his *personal discharge*, although he plead also to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others (*r*).

In Actions ex
Contractu.

(*h*) *Drummond v. Dorant*, 4 T. R. 360; 445. 1 Saund. 207 b.

(*i*) *Butler v. Mapp*, 10 Bing. 391; 4 Moo. & Scott, 258, S. C.

(*k*) *Drummond v. Dorant*, 4 T. R. 360.

(*l*) *Rose v. Boulter*, 1 H. Bl. 108; see *Drummond v. Dorant*, 4 T. R. 360.

(*m*) 1 Saund. 207 a, 203, 339; 2 Ro. Abr. 101, G. pl. 1; *Fleming v. Langton*, 1 Str. 532; *Duperoy v. Johnson*, 7 T. R. 473; *Dicker v. Adams*, 2 B. & P. 165; 1 B. & P. 157; *Bertram v. Gordon*, 6 Taunt.

(*n*) *Ante*, 710. See form of the entry, Chit. Forms. 620.

(*o*) *Strother v. Randerson*, 5 Dowl. 280.

(*p*) 1 Saund. 207 b.

(*q*) *Noke v. Ingham*, 1 Wils. 90; 1 Saund. 207, n.

(*r*) *Noke v. Ingham*, 1 Wils. 89; 1 Doug. 169, n. S. C.: *Hawkins v. Ramsbottom*, 6 Taunt. 179; *Moravia v. Hunter*, 2 M. & Sel. 444.

In actions *ex delicto*, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others at any time *before* final judgment, even although they all join in the same plea, and be found jointly guilty (*s*). And *a fortiori* he may do so where the defendants plead severally (*t*); or where they plead jointly, but their plea in its nature is several; as where in ejectment against several, who jointly plead not guilty, the plaintiff may, even at the assizes, enter a *nolle prosequi* as to one or more of the defendants, and proceed against the rest (*u*). Also, if the jury, in an action of trespass, sever the damages where they should not, the plaintiff may take judgment *de melioribus damnis* against one of the defendants, and enter a *nolle prosequi* as to the other (*x*). Where an action of trover was brought against several defendants, and a verdict taken against all, though the plaintiff had previously informed one of them that no evidence would be given against him, as he would be wanted as a witness, in which capacity he accordingly attended; the court ordered a *nolle prosequi* to be entered, as to that defendant (*y*).

CHAP. XXV.
In Actions *ex*
Delicto.

How entered.] If entered before issue joined, the plaintiff inserts it at the commencement of his replication, &c., and it consequently appears upon the roll when it is made up; but if after issue joined, it is sufficient if it be entered at the time of entering the final judgment (*z*). If the plaintiff inadvertently enter the *nolle prosequi* in an improper way, the court will, perhaps, on application for that purpose in proper time, relieve him from it (*a*).

How entered.

Costs.] Where a *nolle prosequi* is entered as to the whole declaration, the defendant is, and always was, entitled to costs, in the same manner as upon a discontinuance (*b*). And where entered as to some of several counts, or as to part of a count, the plaintiff was not entitled to costs as to these counts, or parts of counts, although he had a verdict on the rest (*c*). But although the plaintiff was not entitled to such costs, yet he was not liable to pay the defendant his costs occasioned thereby. Now, however, by statute 3 & 4 W. 4, c. 42, s. 33, "where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf." And since this enactment it has been held that a *nolle prosequi* as to part of the *sum* claimed in the declaration will entitle defendant to the costs on such *nolle pro-*

Costs.

(*s*) *Cox v. Louthery*, 1 Ld. Raym. 597; *Dale v. Eyre*, 1 Wils. 306; *Parker v. Lawrence*, Hob. 70; *Lover v. Salkeid*, 2 Salk. 455.

(*t*) *Walsh v. Bishop*, Cro. Car. 239; Id. 243, S. C.; 2 Ro. Abr. 100, pl. 5; *Greeves v. Rolts*, 2 Salk. 457.

(*u*) *Gree v. Rolle*, 1 Ld. Raym. 716; 12 Mod. 651, S. C.

(*x*) Vol. I. 323. See form of the entry, Chit. Forms, 621.

(*y*) *Bloomfield v. Blake*, 2 Dowl. 237.

(*z*) *Fleming v. Langton*, 1 Str. 532;

Duperoy v. Johnson, 7 T. R. 473; *Bowden v. Horne*, 7 Bing. 723; 5 Moo. & P. 756, S. C. See form of entry of *nolle prosequi* to the whole declaration, Chit.

Forms, 620; the like to one or more of several counts, Id.; the like as to some of several defendants, Id. 621.

(*a*) See *Bourden v. Horne*, 7 Bing. 723; 5 Moo. & P. 756, S. C.

(*b*) *Cooper v. Tiffin*, 3 T. R. 511. The tenant in a real action was not entitled to costs on a *nolle prosequi*. (*Williams v. Harris*, 1 Bing. N. C. 13; 4 Moo. & Scott, 491, S. C.) See as to the costs of a discontinuance, *ante*, 1057.

(*c*) *Hubbard v. Briggs*, 16 East, 129. As to costs of a *nol. pro.* to one of several counts, see *Goddard v. Smith*, 2 Salk. 456; *Bertram v. Gordon*, 2 Marsh. 144.

BOOK IV.
PART I.

sequi (d). And where, to a declaration in *assumpsit* for money had and received, the defendant pleaded as to all except 3*l.* 5*s.* *non assumpsit*, as to all except 3*l.* 5*s.* a set-off, and as to 3*l.* 5*s.* payment of that sum into court; the plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute his suit except as to the 3*l.* 5*s.*, and took that sum out of court; it was held that the defendant was entitled to his costs of the two first issues (e).

Where a *nolle prosequi* is entered as to one of several defendants, the defendant as to whom it is entered is and always was generally entitled to costs (f). But he was not so if it was entered as to him on a plea of his *personal* discharge, as of his bankruptcy and certificate (g). Now, however, by the statute 3 & 4 W. 4, c. 42, s. 32, he would be entitled to them; that act enacting, "that where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for, and recover, his reasonable costs."

Retraxit.

Retraxit.] A *retraxit* is very similar to a *nolle prosequi* to the whole declaration, excepting that the former is a bar to any future action for the same cause; the latter is not, unless made *after judgment* (h): the former is also made in person, in open court, when the trial is called on; the latter is made by a mere entry on the roll out of court.

As a *retraxit* is very unusual in practice, it is unnecessary to consider it further in this place (i).

(d) *Williams v. Sharwood*, 3 Bing. N. 643; 2 Moore, 718, S. C.

C. 331; 5 Dowl. 371, S. C. In that case it was considered that after a *nol. pros.* the court will not inquire as to the propriety of the pleas.

(g) *Booth v. Middelcoat*, 6 Bing. 445; 4 Moo. & P. 182, S. C.; *Harewood v. Matthews*, 2 Tidd, 9th ed. 981.

(e) *Goode v. Goldsmith*, 2 M. & Wels. 202; 5 Dowl. 288, S. C.

(h) 1 Saund. 207, n.: *Bowden v. Horne*, 7 Bing. 716; 5 Moo. & P. 756, S. C.

(f) *Jackson v. Chambers*, 8 Taunt.

(i) See the form of the entry on the roll, 2 Sellon, 338.

CHAPTER XXVI.

REMITTITUR DAMNA.

CHAP. XXVI.

IN ejectment, if the plaintiff have judgment by confession or default, it is usual for him to remit the damages, and to pray the writ of possession merely (*a*).

In Ejectment.

In *replevin* of a distress for "rent, customs, services, or damage feasant," where the defendant signs judgment of *non-pros* for want of a plea in bar (*b*), he usually remits the damages, sooner than be at the expense of a writ of inquiry, and takes his judgment for a return merely (*c*).

In Replevin.

Where the jury give greater damages than the plaintiff has declared for, it may be rectified by entering a *remittitur* for the excess (*d*); or, if the plaintiff have signed judgment for the greater sum, the court will give him leave to amend it, by entering a *remittitur* for the excess, even in a subsequent term, and after error brought (*e*). And the same, where the jury give damages where they ought not, as in a penal action (*f*). If the plaintiff, however, demand in his declaration more than by his own shewing is due, and there be a special *demurrer* for this cause, he cannot rectify the mistake by entering a *remittitur* for the surplus (*g*); but, if the declaration be not demurred to, it seems he may (*h*), unless the sum demanded depend upon some deed or other instrument, where the debt or duty to be recovered appears certain and entire upon the face of it, as in debt or covenant to pay 20*l.*; in which case a demand of more than appears due is bad, and cannot be aided by the entry of a *remittitur* (*i*). But, if the sum to be recovered may be more or less, by matter extrinsic, as in debt or avowry for rent, if more be demanded than is due, the excess may be remitted (*k*); so, where the debt or duty is composed of several parcels, a demand of more than is due may be aided by a *remittitur* (*l*).

Where the Damages demanded or found are too large or not recoverable.

In an action against several defendants, if the jury sever the damages by mistake, the plaintiff, by entering a *remittitur* as to the lesser damages, may have judgment for the greater damages against all the defendants (*m*).

In Action against several.

(*a*) See form of judgment for plaintiff by *nil dicit* in ejectment, with a *remittitur damna*, Chit. Forms, 367.

(*b*) See *ante*, 804.

(*c*) See the form, Chit. Forms, 440.

(*d*) *Perseval v. Spencer*, Yelv. 45; *Wray v. Lister*, 2 Str. 1110; *Coy v. Hymas*, Id. 1171; Vol. I. 323, 327.

(*e*) MS., M. 1814; *Usher v. Dansey*, 4 M. & Sel. 94; see *Wray v. Lister*, 2 Str. 1110; *Pickwood v. Wright*, 1 H. Bl. 643; *Mills v. Funnell*, 4 D. & R. 561; 2 B. & C. 899, S. C.

(*f*) *Hardy v. Cathcart*, 1 Marsh. 180.

(*g*) 1 Saund. 285, n. (5).

(*h*) 1 Ro. Abr. 784, R. pl. 2; 785, S. pl.

1: Com. Dig. Pleader, C. 48.

(*i*) 1 Saund. 285 a: see *Coy v. Hymas*, 2 Str. 1171.

(*k*) *Ingledeu v. Cripps*, 2 Salk. 659; 7 Mod. 87; 2 Ld. Raym. 814, S. C.; *Morris v. Gelester*, Id. 317; Carth. 437, S. C.

(*l*) *Pemberton v. Shelton*, Cro. Jac. 499; *Ingledeu v. Cripps*, 2 Ld. Raym. 815; 7 Mod. 88, S. C.

(*m*) Vol. I. 323, 324. See form of the entry of a *remittitur* of the damages generally, Chit. Forms, 621; of damages in replevin by defendant, Id. 440; of part of the debt demanded, Id. 321—331; upon some of several counts, Id. 343.

CHAPTER XXVII.

NEW TRIAL.

BOOK IV.
PART I.

What and
when the pro-
per Remedy.

IF any error in the proceedings appear upon the face of the record, the party injured by it has his remedy by *demurrer*, motion in arrest of judgment, or writ of error, according to circumstances; and, therefore, in such cases a new trial will not be granted (*a*). But if any defect of judgment happen from causes wholly extrinsic, arising from matter foreign to or *dehors* the record, the only remedy the party injured by it has, (if we except the writ of error *coram nobis* or *coram vobis* in some few cases), is by application to the court for a new trial. This application for a new trial was substituted for a bill of exceptions (*b*). The court must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial (*c*). The law and decisions on the subject will now be stated under the following heads:—

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| <ol style="list-style-type: none"> 1. <i>Cases in which a new Trial will be granted or not.</i> <i>Mistake, &c., of the Judge, 1086.</i> <i>Default of Officer of the Court, 1089.</i> <i>Default or Misconduct of the Jury, id.</i> <i>Absence, &c., of Counsel or Attorney, 1092.</i> <i>Default or Misconduct of the opposite Party, id.</i> <i>Default or Misconduct of Witnesses, 1093.</i> <i>Discovery of Evidence after the Trial, 1094.</i> <i>Error in Pleadings, Variances, &c., 1095.</i> <i>Where one of several Issues, &c., has been wrongly decided, 1096.</i> <i>Where the Action or Defence is trifling or vexatious, id.</i> | <ol style="list-style-type: none"> 1. <i>Cases in which a New Trial will be granted or not—continued.</i> <i>Where there has been a previous new Trial, 1097.</i> <i>Where leave has been reserved to enter a Nonsuit or Verdict, id.</i> <i>After Writ of Trial or Inquiry before the Sheriff, 1098.</i> <i>In Penal Actions, id.</i> <i>In Ejectment, id.</i> <i>In Replevin, id.</i> 2. <i>Mode of obtaining a New Trial.</i> <i>In what Court, id.</i> <i>By whom, 1099.</i> <i>The Motion and Rule, id.</i> 3. <i>The New Trial, 1103.</i> 4. <i>The Costs, 1106.</i> 5. <i>Venire de Novo, 1106.</i> |
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1. *Cases in which a new Trial will be granted or not.*

Mistake, &c.,
of the Judge.

Mistake, &c., of the Judge.] If the judge misdirect the

(a) *Law v. Crockett*, 7 Price, 566: see Tidd, 9th ed. 913.

(b) See *Bernasconi v. Farebrother*, 3 B. & Ad. 372.

(c) 3 Bl. Com. 392: see *Rex v. Mawbey*, 6 T. R. 638; *Edge v. Frost*, 4 D. & R. 243.

jury (*d*), even in a penal action (*e*), it is, in general, a good ground for a new trial; unless the court be satisfied that justice has been done between the parties, notwithstanding the misdirection (*f*); for instance, if the jury paid no attention to it (*g*). So, if the sheriff or his deputy misdirect the inquest, the court, upon application, will set aside the execution of the writ of inquiry (*h*), unless it appear that substantial justice has been done between the parties (*i*). Where a jury gave a general verdict for the defendant on three issues, having been misdirected on one, the court granted a new trial on payment of costs (*k*). Where the plaintiff's counsel acquiesced in the judge's ruling at the trial, and the defendant took a verdict, without going into his case, the court refused a new trial, on the ground of misdirection (*l*).

CHAP. XXVII.

Misdirection.

In trespass *quare clausum fregit*, issues were joined on three pleas:—1. Of a public carriage-way; 2. Of a public bridle-way; 3. Of a public foot-way: the jury found a verdict for the plaintiff on the first issue, and for the defendant on the third; and the judge, without the plaintiff's consent, discharged the jury from giving a verdict on the second issue; the court granted a new trial, although the plaintiff, at the beginning of the trial, had agreed that the damages, if any, should be merely nominal (*m*). Where, however, there were two issues, and the jury found upon both, but the judge, under a misapprehension that the finding upon the first issue rendered the second useless, discharged the jury upon the second issue, it was held, that the proper course was to apply to the judge to have the verdict entered according to his notes, and not to move for a new trial (*n*).

Improper Discharge of Jury.

So, if a judge improperly nonsuit the plaintiff, a new trial will, in general, be granted (*o*); and this, though the counsel submitted to the nonsuit in deference to the opinion of the judge, such opinion being incorrect (*p*). But it would be otherwise if such opinion were correct (*q*). And where the plaintiff had elected to be nonsuit because the judge directed the jury to give only nominal damages, the Court of Common Pleas refused to grant a new trial (*r*). And, where the judge, on summing up a case, directed the jury, if they came to a certain conclusion, to give their verdict for the plaintiff, but, if they came to either of two other conclusions, which he pointed out, to find for the defendant, and state on which ground their judgment was formed; and the plaintiff then submitted to be nonsuited in deference to the opinion of the

Wrong Nonsuit.

(*d*) *Anon.*, 2 Salk. 649: *How v. Strode*, 2 Wils. 269, 273.

(*e*) *Wilson v. Rastall*, 4 T. R. 753: *Brooke v. Middleton*, 1 Camp. 450: *Calcraft v. Gibbs*, 5 T. R. 19: and this, although the ground for it be not a misdirection. (*Gregory v. Taverner*, 1 C., M. & R. 310).

(*f*) *Edmonson v. Machell*, 2 T. R. 4: see *Cox v. Kitchin*, 1 B. & P. 338: *Calcraft v. Gibbs*, 5 T. R. 20: *Robinson v. Cook*, 6 Taunt. 636: *Wickes v. Clutterbuck*, 2 Bing. 483; 10 Moore, 63, S. C.

(*g*) *Twigg v. Potts*, 1 C., M. & R. 89: *Duke of Newcastle v. Inhabitants of Broxtowe*, 1 Nev. & M. 598.

(*h*) *Markham v. Middleton*, 2 Str. 1259.

(*i*) *Ib.*: and see *Thomas v. Lewis*, 1

Jurist, 982.

(*k*) *Lord v. Wardle*, 3 Bing. N. C. 680; 4 Scott, 402, S. C.

(*l*) *Robinson v. Cook*, 6 Taunt. 336: see *Mellin v. Taylor*, 2 Hodg. 3.

(*m*) *Tinkler v. Rowland*, 4 Ad. & El. 868.

(*n*) *Isles v. Turner*, 3 Dowl. 211.

(*o*) *Rice v. Shute*, 5 Burr. 2612: *Sadler v. Evans*, 4 Id. 1986: *Buscall v. Hogg*, 3 Wils. 146: *Rackham v. Jesup*, Id. 338.

(*p*) *Alexander v. Barker*, 2 C. & J. 133: *Law v. Wilkins*, 1 Nev. & P. 697.

(*q*) *Kindred v. Bagg*, 1 Taunt. 10: see *Pickering v. Dowson*, 4 Taunt. 779: *Robinson v. Cook*, 6 Id. 336: *Elsworth v. Bird*, M'Clel. 69.

(*r*) *Butler v. Dorant*, 3 Taunt. 229: *Simpson v. Clayton*, 2 Bing. N. C. 467.

BOOK IV.
PART I.Wrong Admis-
sion or Rejec-
tion of Evi-
dence.

judge: it was held that he was not entitled to a new trial, on account of misdirection, if either of the two latter points was rightly put to the jury (*s*).

Also, if a judge at the trial, or a sheriff upon the execution of a writ of inquiry, admit improper evidence (*t*), or reject evidence which ought to be admitted (*u*), by which means the result of the trial or inquiry has been different from what it otherwise would have been, the court will, in general, grant a new trial, or set aside the execution of the writ of inquiry (*x*). And, in a case in the Court of Exchequer, it was holden, that a new trial should be granted, unless, with the addition of the rejected evidence, a verdict given for the party offering it would be clearly and manifestly against the weight of evidence (*y*). In some cases, however, the court may refuse a new trial though a witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness, and not disputed (*z*); or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of evidence, and certainly set aside on application to the court as an improper verdict (*a*). Where evidence is tendered for a purpose for which it is not admissible, and rejected, a new trial will not be granted merely because such evidence was admissible for another purpose, not stated at the trial (*b*).

The court will grant a new trial where improper evidence is received and a verdict found for the party adducing it, although there be other evidence to the same point in favour of the same party, unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence (*c*); the Court of Common Pleas, however, refused a new trial for the improper admission of evidence, where there appeared to be sufficient evidence to support the verdict, independently of the evidence so admitted (*d*). If the evidence be not objected to at *Nisi Prius*, the court will not grant a new trial for its admission (*e*).

The court refused to grant a new trial in the sheriff's court, upon the ground that the under-sheriff refused to allow the defendant's attorney to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was not necessary (*f*).

Where the
Objection has
been waived
or not raised
at *Nisi Prius*.

Where an objection is waived at *Nisi Prius*, even though the objection be that evidence required by law was not produced, a new trial will not be granted upon that objection (*g*). In an ejectment by a devisee, it was objected at *Nisi Prius*

(*s*) *Vacher v. Cocks*, 1 B. & Ad. 145.(*t*) *Tutton v. Andrews*, Barnes, 448.(*u*) *Smedley v. Hill*, 2 W. Bl. 1105.(*x*) Rejecting competent witness, *Robinson v. Williamson*, 9 Price, 136: rejecting secondary evidence of lost document, *Freeman v. Arkell*, 2 B. & B. 494: see *Gravenor v. Woodhouse*, 1 Bing. 38: *Crease v. Barrett*, 1 C. M. & R. 919.(*y*) *Crease v. Barrett*, 1 C. M. & R. 919.(*z*) *Edwards v. Evans*, 3 East, 451: *Rex v. Teal*, 11 East, 311: *Alexander v. Barker*, 2 C. & J. 133.(*a*) *Per Parke, B.*, 1 C. M. & R. 933.(*b*) *Rex v. Grant*, 3 Nev. & M. 106.(*c*) *Baron De Rutzen v. Farr*, 4 Ad. & El. 53; 5 Nev. & M. 617, S. C.: *Doe Tat-ham v. Wright*, 1 H. & W. 729.(*d*) *Horford v. Wilson*, 1 Taunt. 12: and see *Doe Teynham v. Tyler*, 6 Bing. 561; 4 Moo. & P. 377, S. C.(*e*) *Melin v. Taylor*, 2 Hodg. 3.(*f*) *Power v. Horton*, 3 Hodges, 14.(*g*) *Shirley v. Matthews*, 1 Jurist, 57: *Melin v. Taylor*, 2 Hodg. 3.

that the legal fee was in trustees named in the will, but the court were of opinion that they took a chattel interest, and the defendant was held precluded from availing himself of this objection as a ground for a new trial, inasmuch as, if the objection has been correctly stated at the trial, the plaintiff might have removed it, by shewing that the chattel interest was determined (*h*). The non-production of a promissory note at a trial before the secondary is no ground for moving for a new trial, unless the objection to its non-production was taken at the time (*i*). An objection to the applicability of evidence must be made before the summing up (*k*).

CHAP. XXVII.

Where a bill of exceptions has been tendered, the court will never grant a new trial upon the same point of law, unless the party consent to waive his bill of exceptions (*l*).

Where there is a Bill of Exceptions.

Default or Misconduct of Officer of the Court.] Where the judge's marshal entered the cause, by mistake, in a wrong list, and the cause was consequently tried as undefended in the absence of the defendant, the court granted a new trial (*m*). And the same where the under-sheriff who returned the panel was attorney for the opposite party (*n*). And the same where the sheriff returned prisoners for debt, taken out of custody, on purpose, to serve as an inquest on a writ of inquiry, and the court would have made the sheriff pay the costs had he been a party to the rule (*o*).

Default or Misconduct of Officer of the Court.

Default or Misconduct of the Jury.] If a juror have been sworn on the jury by a wrong surname (particularly if he be not the person summoned or intended to be sworn) a new trial may be granted (*p*), but otherwise if sworn by a wrong christian name (*q*). It is discretionary, however, with the court to grant a new trial in such a case or not; and they will not do so unless the mistake as to the juror have been productive of some injustice (*r*).

Default or Misconduct of the Jury.

Where sworn by wrong Name.

If the jury find a verdict contrary to evidence, the court will in general grant a new trial (*s*), even in the case of a trial at bar (*t*), particularly if the justice of the case require it (*u*). But if the verdict be such as the justice and equity of the case required, although it be contrary to evidence, yet the court will not disturb it (*x*). So, if a verdict be found for the defendant against evidence, in a vexatious or hard action; or for the

Where Verdict is against Evidence.

(*h*) *Doe Gord v. Needs*, 2-M. & W. 129.

(*i*) *Henn v. Neck*, 3 Dowl. 163.

(*k*) *Abbott v. Parsons*, 7 Bing. 563.

(*l*) *Fabrigas v. Mostyn*, 2 W. Bl. 929; Cowp. 161, S. C.: see *Minchin v. Clement*, 1 B. & Ald. 252.

(*m*) *Hunter v. Hornblower*, 3 Dowl. 491.

(*n*) *Baylis v. Lucas*, Cowp. 112: but see *Mason v. Vickery*, 1 Smith, 364.

(*o*) *Stainton v. Beadle*, 4 T. R. 473.

(*p*) *Norman v. Beaumont*, Willes, 484; Barnes, 453, S. C.: *Wray v. Thorn*, Id. 454; *Parker v. Thornton*, 1 Str. 640; 2 Ld. Raym. 141, S. C.: Vol. I. 267—286: and see *Dovey v. Hobson*, 6 Taunt. 460.

(*q*) *Hill v. Yates*, 12 East, 231, n.: and see *Wray v. Thorn*, Willes, 488.

(*r*) *Hill v. Yates*, 12 East, 229: see

Dickenson v. Blake, 7 Bro. P. C. 177.

(*s*) *Bright v. Eymon*, 1 Burr. 390: *Miller v. Taylor*, 4 Scott, 513: *Levy v. Milne*, 12 Moore, 418.

(*t*) *Musgrave v. Nevinson*, 2 Ld. Raym. 1358.

(*u*) *Morris v. Cleasby*, 1 M. & Sel. 576.

(*x*) *Wilkinson v. Payne*, 4 T. R. 468: *Sampson v. Apleyard*, 3 Wils. 273: *Gostin v. Wilcock*, 2 Id. 302: *Aylett v. Lowe*, 2 W. Bl. 1221: *Foxcroft v. Devonshire*, 2 Burr. 936: *Denn v. Barnard*, Cowp. 597: but see 3 B. & Ald. 692. In *Leeke v. Deer*, (1 Jurist, 983), it is reported to have been decided that the court will not grant a new trial on the ground of the verdict being against evidence, unless the judge who tried the cause recommends it.

BOOK IV.
PART I.Where the
Evidence is
conflicting.Where Da-
mages are
excessive.

plaintiff, after an unconscionable defence set up by the defendant, a new trial will not be granted (*y*). And where the credibility of a witness was left to the jury, and they found a verdict against his evidence, although there was no evidence to impeach his credit, a new trial was refused (*z*).

Also, where evidence has been given on both sides the court will seldom grant a new trial, unless the evidence against the verdict very strongly preponderate (*a*). Yet in a question relating to real property, where the inheritance would be for ever bound by the verdict, the Court of Common Pleas granted a new trial, although the case had been left to the jury upon conflicting evidence (*b*).

For excessive damages, the court will grant a new trial of course, or set aside the execution of a writ of inquiry, in all cases where the damages may be ascertained by mere calculation (*c*); and in other cases of actions *ex contractu*, if it appear clearly that the damages are excessive (*d*). But they have refused to grant a new trial in an action on a bill or note where the jury found for no greater amount than that of the bill or note, though it was alleged that less was due (*e*). And where the value on which the damages were calculated was assented to by both sides at the trial, the court refused to reduce the damages on the ground that the basis of the calculation was erroneous (*f*). In actions *ex delicto*, such as actions for trespass (*g*), for diverting a water-course (*h*), for criminal conversation (*i*), seduction (*k*), battery (*l*), false imprisonment (*m*) or other personal torts (*n*), malicious prosecution (*o*) slander (*p*), or the like, where there is no certain measure of damages (*q*); a new trial is seldom granted on this account, unless the damages be outrageous (*r*), or the court be satisfied that the jury acted under the influence of undue motives, or of gross error or misconception (*s*); and the same, as to the execution of writs

(*y*) *Muckrow v. Hull*, 1 Burr. 11: *Farewell v. Chaffey*, Id. 54: *Reavely v. Mainwaring*, 3 Id. 1306: *Dunkley v. Wade*, 2 Salk. 653: *Smith v. Brampton*, Id. 644; 1 Ld. Raym. 62; 5 Mod. 87, S. C.: *Sparks v. Spicer*, 2 Salk. 648.

(*z*) *Lacey v. Forrester*, 3 Dowl. 668.

(*a*) *Ashley v. Ashley*, 2 Str. 1142: *Doe Mason v. Mason*, 3 Wils. 63: *Swain v. Hall*, Id. 47: *Anon.*, 1 Id. 22: see *Norris v. Freeman*, 3 Id. 38: *Melin v. Taylor*, 3 Bing. N. C. 107, where the jury on conflicting evidence had found for defendant, and on new trial granted there was a verdict for plaintiff with £1,000 damages.

(*b*) *Swinmerton v. Marquis of Stafford*, 3 Taunt. 91; see Id. 232, S. C.: *Lee v. Shore*, 2 D. & R. 198; 1 B. & C. 94, S. C.: *Hodgson v. Forster*, 2 D. & R. 221; 1 B. & C. 110, S. C.: see *Lowden v. Hierons*, 2 Moore, 102.

(*c*) See *Day v. Edwards*, 1 Taunt. 491: *Sowerby v. Lockerby*, 1 Jurist, 796.

(*d*) £3,500 against an attorney of considerable property for breach of promise of marriage has been holden not excessive. (*Wood v. Hurd*, 2 Bing. N. C. 166).

(*e*) *Selly v. Powiss*, 1 H. & W. 2.

(*f*) *Hilton v. Fowler*, 5 Dowl. 312.

(*g*) *Benson v. Frederick*, 3 Burr. 1845: *Ducker v. Wood*, 1 T. R. 277: *Merest v. Harvey*, 5 Taunt. 442; 1 Marsh. 139, S. C.

(*h*) *Pleydell v. Earl of Dorchester*, 7 T. R. 529; 1 Chit. Rep. 729 a.

(*i*) *Duberley v. Gunning*, 4 T. R. 651: *Wilford v. Berkeley*, 1 Burr. 609: see *Chambers v. Caulfield*, 6 East, 244.

(*k*) *Irwin v. Dearman*, 11 East, 23: *Tullidge v. Wade*, 3 Wils. 18.

(*l*) *Jones v. Sparrow*, 5 T. R. 257: *Grey v. Grant*, 2 Wils. 252, £200 for an assault.

(*m*) *Huckle v. Money*, 2 Wils. 205: *Lee-man v. Allen*, Id. 160: *Beardmore v. Carrington*, Id. 244, £1,000 for false imprisonment, under warrant of secretary of state.

(*n*) *Fabrigas v. Mostyn*, 2 W. Bl. 929: *Gilbert v. Burtenshaw*, Cowp. 230. In *Bland v. Bland*, 1 H. & W. 167, £1,000 for a forcible entry into a dwelling-house and staying there three or four days, and distraining to enforce an unfounded claim to the property, was holden not to be excessive.

(*o*) *Leith v. Pope*, 2 W. Bl. 1327: *Norris v. Tyler*, 1 Cowp. 37.

(*p*) *Smith v. Brampton*, 2 Salk. 644.

(*q*) See *Bennett v. Allcott*, 2 T. R. 166: *Day v. Holloway*, 1 Jurist, 794.

(*r*) *Price v. Severne*, 7 Bing. 316; 5 Moo. & P. 125, S. C.: *Sharpe v. Brice*, 2 W. Bl. 942: *Leith v. Pope*, Id. 1327: *Pleydell v. Earl of Dorchester*, 7 T. R. 529: *Bruce v. Rawlins*, 3 Wils. 61.

(*s*) *Chambers v. Caulfield*, 6 East, 244.

of inquiry(*t*). A very clear case of excess must be made out; the mere uncorroborated affidavit of the defendant seems to be insufficient for this purpose(*u*). It is very usual in cases of assault, where an excessive verdict has been given, for the judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial(*v*).

On the other hand, a new trial will not be granted, nor the execution of a writ of inquiry set aside, on account of the smallness of the damages(*w*), unless it have arisen from some mistake, either upon the part of the court(*x*) or of the jury(*y*), or from some unfair practice on the part of the defendant(*z*). Thus, where in a case of slander, the jury gave 20*s.* damages only, the court refused to grant a new trial at the instance of the plaintiff(*a*). Yet where in an undefended action on a mortgage deed, a verdict was taken for the plaintiff by mistake for the principal only, the court refused to increase the damages by adding the interest, but offered to grant a new trial(*b*).

Where Damages are too small.

For the misconduct of the jury, also, the court will in general grant a new trial, if the misconduct be such as to satisfy the court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of the important duties of jurymen: thus, if the jurors eat or drink at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots (*Vol. I.* 287); or if they or any of them have previously declared that the plaintiff should never have a verdict(*c*), or the like; the court will set aside the verdict, and grant a new trial. But if the information of such misconduct come from any of the jurors, or from the unsuccessful party, the court will not receive it(*d*), although in some degree confirmed *alibunde*(*e*). And an affidavit of what one of the jury said of the improper conduct of the jury in finding a verdict, cannot be received to impugn the verdict(*f*). Nor is it, of itself, a sufficient ground for a new trial, that, upon an adjournment at night, in the midst of a trial, the jury separated, although such separation was without the permission of the judge or consent of the parties, and was not in fact known until after the verdict(*g*). Even an admission by jurymen that the verdict was entered by mistake, made after they had separated, though on the day of trial, is not a sufficient ground for a new trial(*h*).

Misconduct in the Jury.

As to granting a new trial where the sheriff who returned

(*t*) *Benson v. Frederick*, 3 Burr. 1485 : *Bruce v. Rawlins*, 3 Wils. 61, 63 : *Irwin v. Dearman*, 11 East, 23.

(*u*) *Lathbury v. Brown*, 10 Moore, 106.

(*v*) *Per Alderson, J.*, 7 Bing. 320 : see *Leeson v. Smith*, 4 Nev. & M. 301.

(*w*) *Hayward v. Newton*, 2 Str. 940 : *Barker v. Dixie*, Id. 1051 : *Manricet v. Brecknock*, 2 Doug. 509, 510.

(*x*) *Marckham v. Middleton*, 2 Str. 1259 : *Noble v. Kennoway*, 2 Doug. 510.

(*y*) *Woodford v. Eades*, 1 Str. 425 : *Levy v. Baillie*, 7 Bing. 349; 5 Moo. & P. 208, S. C.

(*z*) *Wits v. Polehampton*, 2 Salk. 647 : see *Hall v. Stone*, 1 Stra. 515.

(*a*) *Rendall v. Hayward*, 5 Bing. N. C. 424.

(*b*) *Baker v. Brown*, 2 M. & W. 199; 5

Dowl. 313, S. C.

(*c*) *Dent v. Hundred of Hertford*, 2 Salk. 645; 2 Comyn. 601: see *Gainsford v. Blachford*, 6 Price, 36.

(*d*) *Vaise v. Delaval*, 1 T. R. 11: *Onions v. Naish*, 7 Price, 203 : *Hartwright v. Badham*, 11 Price, 383.

(*e*) *Owen v. Warburton*, 1 N. R. 326; see *Hindle v. Birch*, 8 Taunt. 26; 1 Moore, 455, S. C.

(*f*) *Straker v. Graham*, 7 Dowl. 223; 4 M. & W. 721, S. C.

(*g*) *Rex v. Kinnear*, 2 B. & Ald. 468; 1 Chit. Rep. 401, S. C.

(*h*) *Davis v. Taylor*, 2 Chit. Rep. 268.

See a case where all the jury were not present when the verdict was given, *Rex v. Woolter*, 2 Stark. 111; 6 M. & Sel. 366, S. C.

BOOK IV.
PART I.Absence, &c.,
of Counsel or
Attorney.

the panel is interested, or has returned improper persons, see *ante*, 1089.

Absence, &c., of Counsel or Attorney.] The court have granted a new trial, where a verdict has been obtained against a party on account of the absence of his counsel (*i*); but such instances are very rare, and particularly of late. Where a cause was called on and tried as an undefended cause in consequence of the defendant's attorney neglecting to deliver his briefs, the Court of Common Pleas indeed granted a new trial, but ordered the defendant's attorney to pay the costs as between attorney and client, out of his own pocket (*k*). Where a cause, which stood thirty off at the assizes, was taken out of its turn as undefended, in the absence of the defendant's attorney, who was casually absent, no notice having been given that it would be taken as an undefended cause, the court set aside the verdict and granted a new trial, the costs to abide the event (*l*). So, where a cause in the written list for the day was tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the court granted a new trial, only upon payment of costs, and an affidavit of merits (*m*); and even if it were not in the written list, the court will not, in such a case, grant a new trial except upon an affidavit of merits (*n*). The court will not grant a new trial, even on payment of costs, where the defendant or his attorney, having an opportunity of trying, carelessly permits a verdict to be taken against him as in an undefended cause (*o*).

Default or
Misconduct of
the opposite
Party.Improperly
influencing
the Jury.

Default or Misconduct of the opposite Party.] If the party for whom a verdict is afterwards given, deliver to the jury, after they have left the bar, evidence which has not been shewn to the court, a new trial will be granted (*p*). So, if he have laboured the jury, or used improper influence with them, to induce them to give a verdict in his favour, a new trial will be granted. Where hand-bills reflecting on the plaintiff's character were distributed in court, and shewn to the jury on the day of trial, a verdict against him was set aside upon application, and a new trial granted, although the defendant by his affidavit denied all knowledge of the hand-bills (*q*). But merely desiring a juror to attend at the trial of the cause is no ground for a new trial (*r*).

Misleading or
taking by sur-
prise the op-
posite Party.

Where by a fraudulent trick upon the part of the defendant, the plaintiff's counsel were taken by surprise, and the defendant thereby obtained a verdict, the court granted a new trial (*s*). But where a witness proved a fact, which took the opposite party by surprise, the court refused a new trial on that ground, though it appeared that by mistake he had not been cross-examined,

(i) *Anon.*, 2 Salk. 645.

(k) *De Rouffigny v. Peale*, 3 Taunt. 484; *Greatwood v. Sims*, 2 Chit. R. 269; but see *Moody v. Dick*, 2 B. & B. 395; 5 Moore, 164, S. C.; *Watson v. Reeve*, 5 Bing. N. C. 112, *contra*.

(l) *Aust v. Fenwick*, 2 Dowl. 246.

(m) *Fourdriner v. Bradbury*, 3 B. & Ad. 328; see *S. rigger v. Rutherford*, 2 Dowl. 429, without costs.

(n) *Blackhurst v. Bulmer*, 5 B. & Ald. 907; 1 D. & R. 553, S. C.

(o) *Watson v. Reeve*, 5 Bing. N. C. 112; 7 Dowl. 127, S. C.; *Breach v. Caster-*

ton, 7 Bing. 224; 7 Bing. 224; 4 Moo. & P. 867, S. C.; and see *Masters v. Barnwell*, Id., note; and *Gwoit v. Crawley*, 8 Bing. 144; 1 Moo. & Scott, 229, S. C.; *ante*, Vol. I. 265.

(p) Vol. I. 287.

(q) *Coster v. Merest*, 3 B. & B. 272; 7 Moore, 87, S. C.; and see *Spencer v. De Willot*, 3 Smith, 321.

(r) *Snell v. Timbrell*, 1 Str. 643.

(s) MS., E. 1814; see *Anderson v. George*, 1 Burr. 352; *Edie v. East India Company*, 1 W. Bl. 298; *Hewlett v. Cruchley*, 5 Taunt. 277.

nor was there any evidence given to contradict him (*t*). Where a plaintiff was non-suited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the court granted a new trial with costs to be paid by the defendant, but they refused to make the defendant's attorney pay the costs, because he was not present at the trial when the objection was taken, and had given no instructions to the counsel so to do (*u*). Where a particular of demand was so penned as to mislead the defendant, the court granted a new trial (*x*).

If the plaintiff have given no notice of trial, or an insufficient notice, the court will grant a new trial (*y*): so, if no notice of executing a writ of inquiry, or an insufficient notice be given, the court will set aside the execution of the writ (*z*). But these irregularities are waived by the defendant appearing and making a defence (*a*).

Where no
Notice of
Trial given.

Default or Misconduct of Witnesses.] A new trial has been granted on account of the non-attendance of a material witness (*b*); and the court in one case granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff to prevent him from being served with a subpoena (*c*): but in a later case, where a witness for the plaintiff was kept out of the way by the contrivance of the defendant, the court refused a new trial, observing, that the plaintiff ought to have applied for a postponement of the trial, or withdrawn the record (*d*). And the general rule is, that a new trial will not be granted on the ground that evidence has not been given that might have been given at the trial (*e*): and the court will not, on motion for a new trial, hear an affidavit of any facts which might have been brought forward at *Nisi Prius* (*f*). The plaintiff ought, if unprepared with his evidence, either to make application to postpone the trial before the jury are sworn, or should withdraw his record, and not take the chance of a verdict (*g*).

Default or
Misconduct of
Witnesses.
Non-attend-
ance of.

The court have granted a new trial, where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which the defendant could not at the time of the trial be prepared to answer (*h*). The court, however, will not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side (*i*); the witnesses must in general be indicted and

Perjury of
Witness.

(*t*) *Beil v. Thompson*, 2 Chit. 194: see *Harrison v. Harrison*, 9 Price, 89.

(*u*) *Doe Tindal v. Roe*, 5 Dowl. 420.

(*x*) *Stevens v. Villingale*, 4 Scott, 255; 7 C. & P. 702, S. C.: see *Correll v. Cattle*, 5 Dowl. 598.

(*y*) *Thermolin v. Cole*, 2 Salk. 646: *Williams v. Williams*, 2 Dowl. 350: and see *Sprigg v. Rutherford*, 2 Dowl. 429.

(*z*) *Yate v. Swaine*, Barnes, 233.

(*a*) *Thermolin v. Cole*, 2 Salk. 646: *Yate v. Swaine*, Barnes, 233: and see *Doe Antrobus v. Jepson*, 3 B. & Ad. 402: *Fraas v. Paravicini*, 4 Taunt. 545: *Sherman v. Tinsley*, 4 Scott, 286; 3 Hodges, 32, S. C.: ante, Vol. I. 212.

(*b*) *Anon.*, 2 Salk. 645.

(*c*) *Bull. N. P.* 328.

(*d*) *Turquand v. Dawson*, 1 C., M. & R. 709: and see *Edwards v. Dignum*, 2 Dowl. 642: *Packham v. Newman*, 3 Id. 165: *Henning v. Samuel*, 2 Dowl. 766; 3 Moo. & Sc. 818, S. C.

(*e*) *Cooke v. Berry*, 1 Wils. 98; 1 C., M. & R. 710, n.: see *Macbeath v. Ellis*, 4 Bing. 578.

(*f*) *Hope v. Atkins*, 1 Price, 143.

(*g*) *Harrison v. Harrison*, 9 Price, 89: *Edwards v. Dignum*, 2 Dowl. 642: *Elmslie v. Wildman*, 8 Taunt. 236; 2 Moore, 179, S. C.

(*h*) *Fabritius v. Cock*, 3 Burr. 1771.

(*i*) *Feize v. Parkinson*, 4 Taunt. 640: see *Aiken v. Howell*, 1 Nev. & M. 191: *Sprague v. Mitchell*, 2 Chit. 271: but see *Lister v. Mundell*, 1 B. & P. 427: and see *Fabritius v. Cock*, 3 Burr. 1771.

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PART I.

convicted(*m*), or some other satisfactory proof must be offered to the court of the perjury. Even where the witnesses were indicted, we have seen that the court refused to stay execution until the indictment should be tried(*n*). It is no ground for a new trial that a witness who described himself as a christian, and by a wrong name, and was sworn on the New Testament, was really a Jew, unless objected to at the trial, for he may be indicted for perjury(*o*). Also, it seems to be no ground for a new trial that new witnesses have been discovered who can contradict the witnesses at the former trial(*p*).

Mistake of
Witness.

Where a witness made a mistake in his evidence, by reason of which a verdict was given against the party who called him, the court refused a new trial, although the mistake was explained to them by the affidavit of the witness himself(*q*); but in a more recent case, under similar circumstances, the Court of Common Pleas granted a new trial(*r*).

Incompetency
of Witness.

An objection to the competency of witnesses, discovered after the trial, is not of itself a sufficient ground for a new trial; although it may have some weight with the court, where the party applying appears to have merits(*s*); nor is it a sufficient ground that a witness was admitted at the trial on the opposite attorney's undertaking to have him released, which, since the trial, he has refused to do(*t*).

Discovery of
new Evidence,
&c., after the
Trial.

Discovery of new Evidence, &c., after the Trial.] A new trial will seldom be granted, where a verdict has been given against a party, or a plaintiff has been nonsuited, for want of evidence which might have been produced at the trial, because it would tend to introduce perjury(*u*). Even although the evidence is briefed, and his counsel think fit not to produce it(*y*), unless the verdict be manifestly against the justice and equity of the case(*z*). And where a verdict passed against the defendant, and a material witness for him arrived on the following day, the Court of Common Pleas refused him a new trial, because he had not moved to put off the first trial on account of the absence of the witness(*a*). But if new evidence have been discovered after the trial, the court will grant a new trial upon payment of costs, if it be necessary, in order to do justice between the parties. Where the defendant was sued as executor, and was absent from the kingdom at the time the action was brought, the Court of Common Pleas granted a new trial, upon the discovery of evidence after verdict for the plaintiff, although such evidence was in the possession of the defendant's attorney at the time of the trial, but not known by him to be so(*b*). The discovery of witnesses who can contradict those produced on the former trial, seems to be no ground for a new trial(*c*).

(*m*) *Beerfield v. Petrie*, 2 Tidd, 938; *Sealey v. Mayhew*, 4 Bing, 561.

(*n*) *Ante*, 995: *Warwick v. Bruce*, 4 M. & Sel. 140; see *Thurtell v. Beaumont*, 1 Bing, 339; 8 Moore, 612, S. C.

(*o*) *Sells v. Hoare*, 3 B. & B. 232.

(*p*) *Dikenson v. Blake*, 7 Bro. P. C. 177.

(*q*) *Huish v. Sheldon*, Say, 27; but see *Richardson v. Fisher*, 1 Bing, 145; 7 Moore, 546, S. C. *cont.*

(*r*) *Richardson v. Fisher*, 7 Moore, 546; 1 Bing, 145, S. C.

(*s*) *Turner v. Pearte*, 1 T. R. 717.

(*t*) *Hemming v. English*, 3 Dowl. 155.

(*u*) *Cooke v. Berry*, 1 Wils. 98; *King v. Alberton*, 3 Salk. 361; see *Wits v. Polehampton*, 2 Salk. 647; *Spong v. Hogg*, 2 W. Bl. 802.

(*y*) *Spong v. Hogg*, 2 W. Bl. 802; *Hall v. Stothard*, 2 Chit. 267.

(*z*) *Martyn v. Podger*, 5 Burr. 2631.

(*a*) *Elmslie v. Wildman*, 8 Taunt. 236.

(*b*) *Broadhead v. Marshall*, 2 W. Bl. 955; and see *Weak v. Calloway*, 7 Price, 677; *Thurtell v. Beaumont*, 1 Bing, 339.

(*c*) *Dickinson v. Blake*, 7 Bro. P. C. 177.

The court will not grant a new trial, to let the party into a defence of which he was apprized at the first trial(*d*). But where, in an action for a nuisance, which was defended by the defendant's landlord, the defendant not attending at the trial in consequence of his being told that he need not do so, the attorney employed by the landlord entered into a consent-rule to abate the nuisance, without the consent and against the directions of the defendant; the court, upon strong affidavits shewing that the grievance complained of was not a nuisance, set aside an attachment which had issued on the consent-rule, and granted a new trial(*e*).

CHAP. XXVII.

Defence not
set up at
Trial.

Error in Pleadings, Variance, &c.] Where a new trial was applied for, on account of a variance between the issue delivered and the *Nisi Prius* record, the court refused it(*f*). But in an action on a replevin-bond, where the plaintiff was nonsuit because of a variance between the replevin-bond and the record, the court gave leave to amend, upon payment of costs, and ordered a new trial(*g*). In a recent case, after verdict for the plaintiff in debt on bond, (the defendant not appearing at the trial), the court granted a new trial, on the ground that in the issue delivered the pleas were not dated on the day of delivery(*h*). But it seems that such an error cannot be taken advantage of by a defendant who appears at the trial, for, if objected to there, the judge might amend it according to the fact(*i*). As to what errors, in a writ of trial before the sheriff, afford a ground for a new trial, see *Vol. I.* 294.

Error in
Pleadings,
Variance, &c.

Where the plaintiff went to trial without adding the *similiter* to a plea, concluding to the country, and obtained a verdict, the court held that after verdict, the "&c.," at the end of the plea, was equivalent to a *similiter*, and refused a new trial(*k*). A new trial has been refused to the defendant, where his object was to plead specially, and rely upon a defence which he was not permitted to give in evidence under the general issue(*l*). Also, where the defendant's object was to amend a plea of right of way in which the way had been incorrectly described(*m*). And in the last-mentioned case, the court intimated that there was no case in which the defendant would be entitled to a new trial, where the verdict was clearly right, though the pleadings were wrong. An error which may be taken advantage of on motion in arrest of judgment or writ of error, &c., is not a ground for a new trial(*n*). And where a Welsh cause was tried in Monmouthshire instead of Hereford, the court refused to set aside the verdict on that account, as the notice of the trial was for Monmouthshire, and the defendant did not object to it; besides, the objection appeared upon the record, and therefore, if well founded, the party had another remedy(*o*).

When a verdict is taken, subject to the opinion of the court

Defect in Spe-
cial Case.

(*d*) *Vernon v. Hankey*, 2 T. R. 113: see *Buxton v. Mardin*, 1 T. R. 84: *Ritchie v. Bousfield*, 7 Taunt. 309: *Pickering v. Dawson*, 4 Taunt. 779.

(*e*) *Bodington v. Harris*, 1 Bing. 187.

(*f*) *Mather v. Brinker*, 2 Wils. 243: *Doe Cotterill v. Wyld*, 2 B. & Ald. 472: *Jones v. Tatham*, 8 Taunt. 634.

(*g*) *Halhead v. Abrahams*, 3 Taunt. 81: *Williams v. Pratt*, 5 B. & Ald. 896, S. P.: but see *Brown v. Knill*, 4 Nev. & M. 348.

(*h*) *Worthington v. Wigley*, 3 Scott, 355.

(*i*) See *Cox v. Painter*, 1 Nev. & P. 581.

(*k*) *Swain v. Lewis*, 3 Dowl. 700: see cases where the "&c." was omitted, and amendment allowed, even after error brought. (*Siboni v. Kirkman*, 3 M. & W. 46).

(*l*) *Kirby v. Simpson*, 3 Dowl. 791: *Taverner v. Little*, 5 Bing. N. C. 678.

(*m*) *Edwards v. Broxton*, 2 C. & J. 18,

(*n*) *Lane v. Crockett*, 7 Price, 566.

(*o*) *Ambrose v. Rees*, 11 East, 370.

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on a *special case*, and the special case turns out to be so defectively stated that the court cannot give judgment upon it, a new trial will be granted (*p*).

Where one of several issues, &c., has been wrongly decided.

Where one of several Issues, &c., has been wrongly decided.] Where there are several issues, and a verdict on one of them is found against evidence, the court cannot grant a new trial as to that issue only, but must grant it as to all the issues, if they grant it at all (*q*). And the issue thus found against evidence must be a material issue, to induce the court to grant the new trial (*r*). A jury having assessed damages upon an erroneous principle, the court, in granting a new trial, refused to limit the inquiry to the question of damages (*s*). The parties on the second trial, whether under special issues or the general issue, will be confined to the same issues raised on the first trial (*t*). Where two issues were raised by the pleadings, and the jury found upon both, but the judge before whom the cause was tried discharged the jury upon the second issue, upon misapprehension that the verdict upon one issue rendered the other issue immaterial, the court held that the proper course was not to move for a new trial, but to apply to a judge to have the verdict corrected according to his notes (*u*). We shall presently see, that although one of the defendants only be aggrieved, all must in general join in the application for a new trial (*x*).

Where the Action or Defence is trifling or vexatious.

Where the Action or Defence is trifling or vexatious.] The court will not, in general, grant a new trial, where the value of the matter in dispute, or the amount of damages to which the plaintiff would be fairly entitled, is too inconsiderable to merit a second examination (*y*). The value or amount must be twenty pounds, at least, to induce the court to interfere (*z*); unless on trials before the sheriff (*a*), (in which the limited sum is five pounds (*b*)), or the verdict involve some particular right independent of the damages (*c*), and this whether the verdict be for plaintiff or defendant (*d*). The court will, however, sometimes grant a new trial on the ground of a misdirection of the judge, though the verdict be under twenty pounds (*e*); and in a recent case it was granted for a misdirection, though the amount in question was less than 1*l.* (*f*). The rule, as to refusing a new trial in these cases, applies to motions made by plaintiff as well as motions made by defendant (*g*).

Also, if the defendant succeed in a hard or vexatious action, the court will, in general, refuse a new trial (*h*), unless, per-

(*p*) *David v. Herring*, 1 Str. 300: and see *Hankey v. Smith*, 3 T.R. 507, n.: Vol. I. 320.

(*q*) Bul. N. P. 326: *Bernasconi v. Farebrother*, 3 B. & Ald. 372: but see *Hutchinson v. Piper*, 4 Taunt. 555: see as to a *venire de novo*, *Davies v. Lowndes*, 4 Bing. N. C. 478.

(*r*) Bull. N. P. 326.

(*s*) *Mahoney v. Frasi*, 1 C. & M. 325.

(*t*) *Thwaites v. Sainsbury*, 7 Bing. 437; 5 Moo. & P. 321, S. C.

(*u*) *Iles v. Turner*, 3 Dowl. 211.

(*v*) Post, 1099.

(*y*) *Marsh v. Bower*, 2 W. Bl. 851: *Macrow v. Hull*, 1 Burr. 11: *Burton v. Thompson*, 2 Id. 664: *Roberts v. Karr*, 1 Taunt. 495; MS., E. 1814: and see *Vernon v. Hankey*, 2 T.R. 113: *Woods v. Pope*, 1 Bing. N. C. 467; 1 Scott, 536, S. C.: *Haine v. Davy*, 2 H. & W. 30.

(*z*) *Sowell v. Champion*, 2 Nev. & P. 627.

(*a*) *Taylor v. Helps*, 5 B. & Ad. 1068: *Edwards v. Dignum*, 2 Dowl. 642: *sed vide Henning v. Samuel*, Id. 767; 3 Moo. & Scott, 818, S. C., *contra*; *sed quare*?

(*b*) *Puckham v. Newman*, 1 C., M. & R. 585: *Williams v. Eans*, 2 M. & Wels. 220: *Lyddon v. Coombes*, 5 Dowl. 560: *Fleetwood v. Taylor*, 6 Dowl. 796.

(*c*) See *Dyball v. Duffield*, Tidd, 9th ed. 910; 1 Chit. Rep. 265; 1 Y. & J. 402: *Bevan v. Jones*, 2 Y. & J. 264.

(*d*) *Young v. Harris*, 2 C. & J. 14.

(*e*) *Anon.*, v. *Phillips*, 1 C. & M. 26: *Twigg v. Potts*, 1 C., M. & R. 93.

(*f*) *Haine v. Davey*, 4 Ad. & El. 892.

(*g*) Tidd, 9th ed. 913.

(*h*) *Macrow v. Hull*, 1 Burr. 11: *Penprase v. Johns*, 2 Nev. & Man. 376: *Johnson v. Piper*, Id. 672.

haps, where the verdict is contrary to the direction of the judge(*i*). And in many cases the court has refused to disturb a verdict according to the justice of the case, though there has been a misdirection(*k*).

On the other hand, if, on a plea in abatement, the jury find against the defendant, the court will not grant a new trial, even on payment of costs(*l*). Nor will they grant a new trial, to let in a defence not on the merits(*m*).

Nor will the court grant it in any other cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice would be hardly reconcileable to conscience. Where a man recovered a sum composed of several items, some of which he was not in strict law entitled to recover under the declaration in that action, but which he would clearly be entitled to recover in a different form of action, the court refused to grant a new trial, or reduce the damages(*n*).

Where there has been a previous new Trial.] If the jury at the second trial find for the party against whom the former verdict was given, the court, if the case be doubtful, or the second verdict do not accord with the justice of the case, may be induced, under circumstances, to grant a third trial. It is entirely in the discretion of the court, however, to do so or not; for the losing party, in such a case, is not entitled to it by any rule or practice of the court(*o*); and they have accordingly refused it where the second verdict was satisfactory(*o*). It is also in the discretion of the court to grant a third trial after two concurring verdicts(*p*). But this is seldom done(*q*), and the court have refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict(*r*); and the same where the two concurring verdicts were for the defendant, even although the judge, before whom the second trial was had, expressed himself dissatisfied with the verdict(*s*). But where, in such a case, the action was brought for a matter savouring of the realty, and the plaintiff would have been concluded by the verdict, the court, under circumstances, set aside the last verdict, and ordered a nonsuit to be entered, leaving the plaintiff to contest the matter a third time, if he would(*t*).

Where Leave has been reserved to enter a Nonsuit or Verdict.] If the judge at the trial, when there is a doubt whether the action will lie, allow the plaintiff to take a verdict, with liberty for the defendant to move to set aside the verdict, and enter a nonsuit, the defendant may move accordingly, and so obtain the opinion of the court upon the subject; but without such leave, he cannot move to enter a nonsuit(*u*). And on this motion, it seems, the court will consider not merely the

(i) See *Farrant v. Olmius*, 3 B. & Ald. 692.

(k) See *Edmonson v. Machall*, 2 T. R. 4: *Wilkinson v. Payn*, 4 T. R. 468: *Cox v. Kitchen*, 1 B. & P. 338.

(l) *Shaw v. Hislop*, 4 D. & R. 241.

(m) *Gist v. Masin*, 1 T. R. 84: *Tulidge v. Wade*, 3 Wils. 18.

(n) *Mayfield v. Wadsley*, 3 B. & C. 357.

(o) *Parker v. Ansel*, 2 W. Bl. 963.

(p) *Goodwin v. Gibbons*, 4 Burr. 2101.

(q) See *Foster v. Steele*, 3 Bing. N. C. 892.

(r) *Clerk v. Udall*, 2 Salk. 649: *Chambers v. Robinson*, 2 Str. 692.

(s) *Swinerton v. Marquis of Stafford*, 3 Taunt. 232.

(t) *Lee v. Shore*, 2 D. & R. 198; 1 B. & C. 94, S. C.

(u) Vol I. 314: *Minchin v. Clement*, 1 B. & Ald. 252: *Watkins v. Towers*, 2 T. R. 275 to 281.

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point reserved, but the whole case(*x*). So, where a plaintiff has been nonsuited, the court may order the nonsuit to be set aside, and a verdict entered for him, if the judge at *Nisi Prius* gave him leave to move to that effect(*y*); but not otherwise. And on either of these motions it seems that the court, instead of allowing a nonsuit or verdict to be entered, may re-model the rule; and send down the case for a new trial, if that course be more in accordance with the justice of the case(*z*).

After Writ of Trial or Inquiry before the Sheriff.

After Writ of Trial or Inquiry before the Sheriff.] The execution of a writ of inquiry may be set aside, and a new writ awarded for the same causes as a verdict: as to this, see *ante*, 719. The execution of a writ of trial may also be set aside, and a new trial granted thereon, for similar causes: as to which see *ante*, Vol. I. 297. And as to when a new trial will be granted for a defect in the writ of trial or issue, see *ante*, Vol. I. 294.

In Penal Actions.

In Penal Actions.] In penal actions, if there be a verdict for plaintiff, the court will grant a new trial in the like cases as in other actions; but if the jury have found a verdict for the defendant, a new trial is never granted(*a*), unless for a mistake of law(*b*), or misdirection of the judge(*c*). But it is otherwise in penal actions by parties aggrieved(*d*). The rule in such cases is the same as in other actions.

In Ejectment.

In Ejectment.] In ejectment, where the verdict is for the defendant, the court will seldom grant a new trial, because the plaintiff may, if he will, bring a new action; but otherwise if found for the plaintiff, and the circumstances of the case in other respects warrant them in granting it(*e*).

In Replevin.

In Replevin.] In replevin, where the verdict is for the plaintiff, the court will be more cautious in granting a new trial than in other actions, and will not grant it unless upon very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs(*f*).

2. Mode of obtaining a new Trial.

2. Mode of obtaining a new Trial.

In what Court.

In what Court.] The motion for a rule to shew cause why a verdict should not be set aside, and a new trial granted, is made in the court from which the *venire* issued, even in cases where the action is brought under the Lord Chancellor's orders(*g*); but in the case of an issue out of Chancery, the motion, we have seen, (Vol. I. 647), must in general be made in the court

(*x*) See *Doe v. Dodd*, 2 Nev. & M. 838.

(*y*) *Treacher v. Hinton*, 4 B. & Ald. 413.

(*z*) See *Doe Wyatt v. Staff*, 5 Bing. N. C. 424; *Higgins v. Nichols*, 7 Dowl. 551.

(*a*) *Brook v. Middleton*, 10 East, 268; *Matthison v. Allanson*, 2 Str. 1233; *Jervois v. Hall*, 1 Wils. 17; *Foucreau v. —*, 3 Wils. 39: *sed vide Gregory v. Taverner*, Exch. 16th Jan. 1834, in which it was granted on the same rule as other cases. (See *Rez v. Sutton*, 5 B. & Ad. 52).

(*b*) *Gregory v. Tuffs*, 2 Dowl. 711; 1 C., M. & R. 310, S. C.

(*c*) *Ante*, 1087.

(*d*) *Lord Selsea v. Powell*, 6 Taunt. 297.

(*e*) *Goodtitle d. Alexander v. Clayton*, 4 Burr. 2224; *Wright d. Clymer v. Littler*, 2 Id. 1244; 1 W. Bl. 348, S. C.: see *Smith d. Dormer v. Parkhurst*, 2 Str. 1105.

(*f*) *Parry v. Duncan*, 7 Bing. 243; 5 Moo. & P. 19, S. C.

(*g*) *Carstairs v. Stein*, 4 M. & Sel. 192; Tidd, 913.

which directed the issue. A motion for a new trial, in an action brought in the Common Pleas at Lancaster, must be made in the court in which the judge sits who presided at the trial (*i*). CHAP. XXVII.

By whom Applied for.] The motion may, in general, be made by the party who has been aggrieved by the first trial; but when the action is against several defendants, the application should be made on the behalf of all of them; and, therefore, when one defendant was found guilty and the other acquitted, it was holden that the former could not have a new trial (*k*). So, in trespass against several, where the verdict was contrary to evidence as to one of them, a new trial was refused (*l*). But in an action on the case against seventeen defendants, two suffered judgment by default; fifteen pleaded the general issue: plaintiff entered a *nolle prosequi* against one of the two, obtained upon a writ of inquiry a verdict for 900*l.* against the other, and the jury found their verdict in favour of the fifteen. The verdict as to five of the fifteen being unwarranted, the Court of Common Pleas granted a new trial against them, leaving the verdict against the others, and against the defendant, who suffered judgment by default, undisturbed (*m*). By whom applied for.

The Motion and Rule for.] The motion for the rule nisi must be made within four days after the *distringas* is returnable, if the cause be tried in term; or if the cause be tried in vacation, then within the first four days of the term next after the trial (*n*); unless under particular circumstances (*o*), in which case the court may, in their discretion, allow a new trial to be moved for at any time before judgment has been actually signed (*p*). The four days are reckoned inclusive of the first and last day, but Sunday, though not the last, is not reckoned one (*q*), nor is any other day on which the court do not sit (*r*). If the cause be tried at the sittings in term, a new trial may be moved for any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial (*s*). If there be not so many as four days in the term after the return of the *distringas*, then it would seem that the motion must be made on or before the last day of the term (*t*). This rule, as to the moving within the four days after the *distringas* is returnable, is rigidly adhered to; and although, when counsel cannot be heard on all the motions within the first four days, it is now of course on the fourth day of Michaelmas and Easter terms, at the rising of the court, to allow those that cannot be heard within the time to be inserted in the list, and to be heard within the fifth and The Motion and Rule for.
At what Time to be made.

(*i*) *Foster v. Jolly*, 1 C., M. & R. 703.

(*k*) *Parker v. Godin*, 2 Str. 814: *Bond v. Sparke*, 12 Mod. 275: but see *Re v. Mawbey*, 6 T. R. 638: and see *Cooper v. South*, 4 Taunt. 802.

(*l*) *Sir Charles Berrington's case*, 3 Salk. 362.

(*m*) *Price v. Harris*, 10 Bing. 331; 4 Moo. & Scott, 474, S. C.

(*n*) *Kirkham v. Marter*, 2 B. & Ald. 613; 1 Chit. Rep. 382: *Mason v. Clarke*, 1 C. & J. 411; 1 Dowl. 288, S. C.: *Birt v. Barlow*, 1 Doug. 171: *Re v. Holt*, 5 T. R. 436: *Lee v. Carlton*, 3 Id. 642.

(*o*) *Birt v. Barlow*, 1 Doug. 171. In

Thomas v. Edwards, (2 Dowl. 664; 1 C., M. & R. 382, S. C.), the court granted further time where the under-sheriff refused to furnish his notes of the trial.

(*p*) *Re v. Gough*, 2 Doug. 797: and see *Re v. Holt*, 5 T. R. 436; 1 G. 4, c. 87, s. 3, ante, 782.

(*q*) *Tidd*, 9th ed. 912: *Kirkham v. Marter*, 1 Chit. Rep. 382; 2 B. & Ald. 613, S. C.

(*r*) *Bromley v. Foster*, 1 Chit. Rep. 562.

(*s*) *Mason v. Clarke*, 1 Dowl. 288; 1 C. & J. 411, S. C.

(*t*) See *Kirkham v. Marter*, 2 B. & Ald. 613; 1 Chit. Rep. 382, S. C.

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successive days(*u*); yet the court censure any delay in moving for a new trial even to the last of the four days, and have expressed a wish that the motions, when practicable, should be made on the first and second days. And in Hilary term, 1828, Lord *Tenterden*, C. J., said, that the Court of King's Bench wished it to be understood, that for the future, in *Hilary* and *Trinity* terms, the court would not hear any motion for a new trial unless such motion were actually made within the first *four* days of the term; and that even if counsel were instructed within the first *four* days, and there should not be time to hear them on the fourth day, the court would not hear them afterwards; and in such cases the parties could only blame themselves for not instructing their counsel sufficiently early(*x*). In the Common Pleas there is also a rule of Easter term, 2 G. 4, that "in *Hilary* and *Trinity* terms, no motion for a new trial shall be heard, unless such motion be actually made within the first *four* days of each of the said terms." And, in general, the motion for a new trial must be made in that court within the first *four* days of the term, if the cause be tried in vacation; and cannot be received after the *four* days, unless where the foundation for the motion is a fact not disclosed to the party till after that time(*y*). In the Exchequer there is also a rule, that motions for new trials must be made within the first *four* days of term(*z*). The motion cannot be made after the *four* days, even though the parties consent thereto(*a*). Where a rule for a new trial having been moved for by mistake in the Queen's Bench instead of the Exchequer, and the mistake not having been discovered until after the first *four* days of the term had elapsed, the Court of Exchequer, under the circumstances, allowed the motion to stand good as of that court(*b*). Where a motion for a new trial is by accident delayed beyond the *four* days, notice ought to be given to the other side, otherwise the expense of intermediate proceedings will fall on the party delaying to move(*c*). And where a notice for a new trial is made after the first *four* days of the term, by leave of the court, granted in consequence of the press of business, notice should be given to the opposite party, otherwise it would be regular to sign judgment on the fifth day(*d*). As to motions for new trials, in trials before the sheriff, see *ante*, Vol. I. 298.

Not after Motion in Arrest of Judgment.

A new trial cannot in general be moved for, after a motion in arrest of judgment(*e*); and the usual and proper course is, in cases where there may be a ground for moving in arrest of judgment, to move, at the time of moving for a new trial, in arrest of judgment also(*e*). It should seem, indeed, that the practice requiring the motion for a new trial to be made before that in arrest of judgment, extends only to cases where the party has knowledge of the fact at the time of moving in arrest of judgment, and therefore a new trial was granted after

(*u*) 3 C. & P. 111 a: Tidd's Sup. 159: 382: *Rex v. Holt*, 5 T. R. 436.
Chit. Sum. Prac. 189.

(*x*) 3 Carr. & P. 111 a.

(*y*) *Willis v. Bennett*, Barnes, 443:
Reynolds v. Simonds, Id. 446; Pr. Reg. 547.
410, S. C.

(*z*) See 3 Leg. Obs. 43: Tidd's New
Pract. 542.

(*a*) *Kirkham v. Marter*, 1 Chit. Rep.

(*b*) *Piggott v. Kemp*, 2 Dowl. 20.

(*c*) *Lester v. Lazarus*, 4 Dowl. 444.

(*d*) *Doe Duncan v. Edwards*, 7 Dowl.

(*e*) *Philpot v. Page*, 4 B. & C. 160; 6
D. & R. 281, S. C.: *Tubervil v. Stamp*, 2
Salk. 647.

such motion, on an affidavit that the jury drew lots for their verdict (*f*). CHAP. XXVII.

The motion for a new trial cannot be made after error brought by the party making the application (*g*). Nor after a bill of exceptions has been tendered on the same point of law, unless the party consent to waive the bill of exceptions (*h*). Nor after Error, &c., brought.

We have seen (*ante*, Vol. I. 331) that by the 1 W. 4, c. 7, s. 2, the judge who tried the cause has power to certify that, in his opinion, execution ought to issue forthwith, or on some day to be named in such certificate, though before the next term; but that the 4th section still leaves the party affected by such certificate the right to apply to the court to set aside the judgment and execution, or stay the same, and to arrest the judgment, or grant a new trial. You should, in a case of this nature, make an affidavit, fully stating the facts, and move the court as soon as possible (*i*). After Certificate for immediate Execution.

After a rule *nisi* for a new trial has been granted on certain points, it is irregular to make another motion upon another point, respecting the same cause, to come on at the same time (*j*). Second Motion on fresh Points.

Any affidavits to be made use of in moving for it must also be sworn within the four days above mentioned, unless the special permission of the court to the contrary be obtained (*k*). It should also be observed, that the affidavits must in all cases be made before obtaining the rule *nisi*; and this rule is strictly adhered to. We have already seen, that the court will not receive the affidavit of a juror impugning the verdict (*l*); nor will they receive affidavits as to the admissions of jurymen to the same effect (*m*). Affidavits in Support of.

Inasmuch as the granting of the rule *nisi* for a new trial suspends the judgment and execution, and occasions an accumulation of the heavier description of business, the court (unless the judge who tried the cause has expressed a strong opinion in favour of the application) will in the first instance invariably examine the grounds of the motion, and refuse it, unless there is a probable ground to expect that the rule will ultimately be made absolute. If the ground of the application is an irregularity in the proceeding, or on account of surprise, or the absence of counsel or attorney, or other mere practical point, the court will direct that the rule *nisi* shall not be placed in the new trial paper, but come on for discussion as a common rule. But where the case requires the report of the judge who tried the cause to be read, then the rule *nisi* will come on in the new trial paper, on particular days set apart for discussion of that description of business (*n*). When put in new Trial Papers; or merely as a Rule.

When the court have granted the rule *nisi*, draw it up with one of the masters (*o*); and serve a copy of it upon the attorney or agent of the opposite party. A rule *nisi* for a new trial obtained and served by an attorney, different from the Rule Nisi, how drawn up and brought on for Argument, &c.

(*f*) Bull. N. P. 326; Tidd, 913.

(*g*) Tidd, 913; but see 1 B. & P. 109, *n.*, *contra*.

(*h*) *Ante*, 1089.

(*i*) Chit. Sum. Prac. 193.

(*j*) *Robertson v. Barker*, 2 Dowl. 39; see as to amending the rule *nisi*, *Lopez v. De Tastet*, 8 Taunt. 712.

(*k*) R. T., 5 G. 4: 4 D. & R. 836: 3 B.

& C. 176.

(*l*) *R. v. Wooller*, 6 M. & Sel. 366; *Bridgwood v. Wynn*, 1 H. & W. 574: *ante*, 1091.

(*m*) *Davis v. Taylor*, 2 Chit. Rep. 268; *Straker v. Graham*, 7 Dowl. 223; 4 M. & W. S. C.; *ante*, 1091.

(*n*) Chit. Sum. Pract. 192.

(*o*) See a form of rule *nisi*, stating the grounds of motion, Chit. Forms, 622.

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attorney on record, without an order to change, cannot be considered as a nullity (*p*). Then, before the time of shewing cause, if the action were tried in London or Middlesex, deliver a note in writing (*q*) at the house or chambers of the Lord Chief Justice, "specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion" (*R. M.*, 40, G. 3); and if tried by any of the puisne judges, some intimation should be given to his clerk, of the rule nisi having been granted, at least the evening before the case is to be argued. If the cause were tried in any other county, by a judge of this court, mention to his clerk that the rule nisi has been granted, and the judge will take care to have his notes and minutes of evidence in court when the case is called on; if tried by a judge of another court, serve a copy of the rule nisi on his clerk, who will thereupon deliver the judge's report of the trial to the junior puisne judge of the court in which the action is pending. If the cause was tried before the sheriff, &c., under the 3 & 4 W. 4, c. 42, see the mode of application pointed out ante Vol. I. 298. Deliver to your counsel one of the briefs in the original cause, together with such further instructions and observations as you may think fit; you may learn from the paper of causes at the office of the masters the day the case will be argued.

The Argument, &c.

When the case is called on, the judge who tried the cause, or, if it were tried by a judge of another court, the junior puisne judge, will read his report of the trial; after which the counsel on the opposite side shew cause against the rule; the counsel for the party who moved for the rule *nisi* speak in support of it, and the court then state their opinion, and either discharge the rule, or make it absolute. The court will look only to the judge's report for the evidence given at the trial, and the manner in which the judge summed up the case, (if that be stated in it), and will not attend to any contrary statement of them by counsel, or even by affidavit (*r*). The Court of Queen's Bench may look at the record in discussing a motion for a new trial, although the rule is not drawn up on reading it; in the Common Pleas the rule is drawn up on reading the record (*s*). It may be added, that though the motion be for a nonsuit, yet the court may remodel the rule, and grant a new trial instead of allowing a nonsuit to be entered (*t*).

What Terms imposed.

If the court make the rule absolute, they may do so upon terms, if necessary; such as, that witnesses infirm or going beyond sea may be examined upon interrogatories, or that their evidence may be read from the judge's notes of the first trial (*u*); that certain deeds, books, papers, &c., may be produced at the trial; that certain facts, not intended to be litigated, may be admitted (*v*); or that the party may make discovery of certain facts upon oath, in order to prevent the necessity of having recourse to a court of equity for it. Where an action was carried on by a bankrupt for the benefit of his creditors, the court refused to grant a new trial,

(*p*) *Doe Bloomer v. Branson*, 6 Dowl. & Wels. 391.
490.

(*q*) See form, Chit. Forms, 623.

(*r*) *R. v. Grant*, 3 Nev. & M. 109, per Denman, C. J.

(*s*) *Sherry v. Oke*, 3 Dowl. 349; 1 H. & W. 119, S. C.; and see *Platt v. Hall*, 2 M.

& (*t*) *Higgins v. Nichols*, 7 Dowl. 551.

(*u*) *Anon.*, 2 Chit. 425.

(*v*) See *Thwaites v. Sainsbury*, 7 Bing. 437; but this cannot be done where the new trial is a matter of right. (*Mahony v. Frasi*, 1 Cr. & M. 325; 1 Dowl. 70, S. C.)

unless the assignees would consent to be bound by the event of the action, and to be responsible for the costs (*x*). Where the plaintiff has died after verdict, the court may grant a new trial, on the application of the defendant, on the same grounds on which a new trial may be granted in other cases, and will, in such case, impose terms on him to prevent his taking advantage of the plaintiff's death (*y*). Where a rule *nisi* for a new trial is granted on the terms of bringing the amount of the verdict into court, the money must be brought in before the rule *nisi* is drawn up (*z*).

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It is the practice to allow amendments to be made, on terms, after the trial, where the justice of the case requires it (*a*). (*See post*, Chap. 30).

Amendment after Trial.

If made absolute, draw up the rule with one of the masters (*b*), and serve a copy on the plaintiff's attorney or agent; or, if made absolute upon payment of costs, get an appointment on the rule from the master, and serve a copy of the rule and appointment. Get the costs taxed, and pay them without delay; otherwise the opposite party may move to discharge the rule for a new trial, and that he may be at liberty to sign judgment. Where a plaintiff, after setting aside a nonsuit upon payment of costs, proceeded to a second trial without paying these costs, and obtained a verdict, the court set aside the verdict, and gave the defendant leave to sign his judgment in the original action, unless the costs should be paid within ten days (*c*).

Proceedings on Rule absolute.

If the rule be discharged, sign judgment and tax your costs, as in ordinary cases.

On Rule discharged.

3. The new Trial.

The party obtaining the rule is not bound to proceed to the new trial in any limited time (*d*).

3. The New Trial.

The former *Nisi Prius* record will answer, unless the *postea* have been indorsed upon it, in which case you must make out a new *Nisi Prius* record: if you use the former record, the *jurata* must be altered in the same manner as when the cause is made a *remanet* (*e*). Give notice of trial, sue out jury process, and enter your cause for trial, as in ordinary cases.

When.
Nisi Prius Record, &c.

The second verdict alone appears upon the *postea*. Also, upon the judgment roll, no notice is taken of the first verdict, but the record proceeds as if the second verdict was the only one that was given (*f*).

Entry on Record after.

If the plaintiff do not proceed to the second trial, the defendant may carry down the record by *proviso*; but he cannot do so until after the next term or assizes from that in which the new trial was granted (*g*). And in case the plaintiff neglects to try the cause after a new trial has been granted,

Trial by Proviso.

(*x*) *Noble v. Adams*, 7 Taunt. 59.

(*y*) *Griffiths v. Williams*, 1 C. & J. 47; and a case in Q. B. there cited.

(*z*) *Clare v. Frestul*, 2 Dowl. 617.

(*a*) *Tomlinson v. Blacksmith*, 7 T. R. 132; *Wilder v. Handy*, 2 Str. 1151; *Marsshall v. Riggs*, Id. 1162; *Dennis v. Edwards*, Comb. 4. When not, see *Price v. Severn*, 7 Bing. 402; 5 Moo. & P. 250; 1 Dowl. 215, S. C.

(*b*) See *Lopez v. De Tastet*, 8 Taunt.,

712; 7 Moore, 120, S. C.

(*c*) *Nicholls v. Bozon*, 13 East, 185; see *Hullock*, 401.

(*d*) *Buckley v. Hollis*, T. T. 1815; *Tidd*, 9th ed. 917, S. C.

(*e*) See Vol. I. 260; and see *Harper v. Davy*, 1 Ld. Raym. 510; *Carth.* 498, S. C.

(*f*) 2 Saund. 253 a, n. (8).

(*g*) *Staffordshire and Worcestershire Canal Company v. The Trent and Mersey Canal Company*, 5 Taunt. 577.

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in the case of a trial before the sheriff the defendant should move to discharge the writ of trial, and then take the cause down by *proviso* (*h*).

4. The Costs.

4. The Costs.

It is entirely in the discretion of the court, whether they will oblige the party applying for a new trial to pay costs, as a condition precedent to his proceeding to a second trial.

In case of
Misdirection.

Upon setting aside a nonsuit, or a verdict for misdirection of the judge, the court grant a new trial usually without costs (*i*).

In case of
Misconduct,
&c., of Jury.

Where the verdict was set aside for the misconduct of the jury, the court ordered the costs to abide the event of the second trial (*k*); if set aside, because the verdict was contrary to law or to the opinion or direction of the judge, a new trial is granted usually without costs (*l*); but if because the verdict was contrary to evidence, or because of excessive damages, the new trial is usually granted upon payment of costs (*m*). Where during the trial of a cause one of the jury absconded, and the others were accordingly discharged, and a second trial was afterwards had, when a verdict was found for the plaintiff, it was held that the plaintiff was entitled to costs of the first trial (*n*). But if a judge of his own authority discharges a jury from giving a verdict on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial (*o*).

In case of
Fraud or Sur-
prise.

If a party have obtained a verdict by trick, the court will grant a new trial without costs, or, perhaps, in very gross cases, will oblige him to pay the costs (*p*). Where a new trial was granted because the plaintiff had a material witness for the defendant concealed in his house, and prevented him from being served with a *subpoena*, it was granted without costs (*q*). If granted on the ground of surprise not fraudulent, it seems it will be on payment of costs (*r*).

On new
Ground.

If a new trial be granted upon a ground not opened at the first trial, it will be upon payment of costs (*s*).

Where new
Trial granted
without Men-
tion of Costs.

By *R. H.*, 2 *W.* 4, *r.* 64, "if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second" (*t*). Consequently, if the rule for a new trial says nothing about the costs of the first trial, they

(*h*) *Corone v. Garment*, 1 *Hodges*, 74: *Day v. Day*, 1 *M. & Wels.* 39; 4 *Dowl.* 740; 1 *Gale*, 403; 1 *T. & G.* 314, *S. C.*

(*i*) *Buscall v. Hogg*, 3 *Wils.* 146; *Vale v. Bayle*, *Cowp.* 297; *Harris v. Butterley*, 2 *Id.* 485; *Jackson v. Duchaire*, 3 *T. R.* 553; *Goodright v. Saul*, 4 *Id.* 359, *Hullock*, 388.

(*k*) *Hale v. Cove*, 1 *Str.* 642.

(*l*) *Hullock*, 387; *Furneaux v. Hutchins*, *Cowp.* 808; *Pochin v. Pawley*, 1 *W. Bl.* 670; *Jackson v. Duchaire*, 3 *T. R.* 551; *Farrant v. Olmud*, 3 *B. & Ald.* 692.

(*m*) *Anon.*, 12 *Mod.* 370; *Macrow v. Hull*, 1 *Burr.* 12; *Bright v. Eymon*, *Id.* 393; *Burton v. Thompson*, 2 *Id.* 665; *Doe v. Pike*, 1 *Nev. & M.* 385.

(*n*) *Harrison v. Bennett*, 1 *C. & M.* 203.

(*o*) *Seely v. Powis*, 3 *Dowl.* 372.

(*p*) *Anderson v. George*, 1 *Burr.* 352; see *Hullock*, 391.

(*q*) *Bull. N. P.* 328; but see *Turquand v. Dawson*, 1 *C. M. & R.* 709, where the court refused a new trial, applied for by the plaintiff, on a similar ground (*ante*, 1093).

(*r*) See *Greatwood v. Sims*, 2 *Chit.* 269.

(*s*) *Sutton v. Mitchell*, 1 *T. R.* 20.

(*t*) See the former practice by which in *C. P. & Exch.*, but not in *Q. B.*, a party who succeeded in both trials was entitled to the costs of the first, though not mentioned in the rule. (*Tidd*, 9th ed. 916; *Truslove v. Barton*, 10 *Moore*, 96; *Loader v. Thomas*, 3 *Y. & J.* 525; 1 *C. & J.* 54, *S. C.*)

fall to the ground as a matter of course (*u*). Where, after a verdict for the plaintiff, a new trial was obtained, and the rule was silent as to costs, and after the plaintiff had applied for a special jury the defendant withdrew his plea and suffered judgment by default, and damages were assessed thereon; the court held that the plaintiff was not entitled to the costs of the first trial (*x*). And where the first trial is abortive, and neither party is liable to the costs of it in the first instance, both parties are in the same situation as to costs as if no trial had taken place, and the plaintiff will not make himself liable to the costs of it by discontinuing, nor will the defendant by withdrawing his defence, and suffering judgment by default (*y*). So, where the cause was referred at *Nisi Prius*, and the award was afterwards set aside, and a second trial had, the successful party was held not to be entitled to the costs of the first trial (*z*). But the rule applies only to the costs of those issues on which a new trial is granted. Where, therefore, on the trial of a right of way in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants, and the court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count, but in the rule no mention was made of costs, nor any reservation of defendant's verdict on the first count; the court held that the defendants were nevertheless entitled to the costs of the issues found for them on the first trial, and not in contest on the second, they having succeeded on such second trial (*a*). After a verdict for the plaintiff, a new trial was obtained by defendant, and the rule was silent as to costs, and the plaintiff afterwards discontinued; the court held the defendant was not entitled to the costs of the trial (*b*).

Where the costs are ordered to abide the event of the second trial, if the same party succeed on both trials, he shall have the costs of the first as well as the second (*c*); but otherwise the costs of the first shall not be allowed (*d*). Where, however, the second trial was granted on the application of the plaintiff on account of the smallness of the damages, and the costs were to abide the event, and the plaintiff at the second trial obtained only the same amount of damages; he was held entitled to the costs of the second trial only (*e*). By "the event of the second trial" is meant the ultimate event of the cause; and, therefore, if the verdict at the second trial be set aside, and on the third trial the ultimate

Where the Costs are ordered to abide the Event.

(*u*) *Colvin v. Newbury*, 2 Dowl. 415: and see *Porter v. Cooper*, 3 Id. 662; 2 C., M. & R. 232, S. C.

(*x*) *Peacock v. Harris*, 1 Nev. & P. 240; 5 Ad. & El. 449, S. C.: see *Elvin v. Drummond*, 4 Bing 415.

(*y*) *Jolliffe v. Mundy*, 4 M. & W. 502; 7 Dowl. 225, S. C.: *infra*, n. (*b*).

(*z*) *Wood v. Duncan*, 7 Dowl. 344; 5 M. & W. 87, S. C.

(*a*) *Bower v. Hill*, 2 Scott, 535, 540; 5 Dowl. 183, S. C.: *sed vide* *Peacock v. Harris*, 1 Nev. & P. 240; 5 Ad. & El. 449, S. C.

(*b*) *Gray v. Cor*, 5 B. & C. 458; 8 D. & R. 220, S. C. The cases of *Sweeting v. Halse*, 9 B. & C. 369, n.: *Chapple v. Durs-ton*, 1 C. & J. 111: *Jackson v. Halland*, 2 B. & Ald. 317; 1 Chit. Rep. 19, S. C.,

which are to the contrary of those in the text, were decided before the above rule of H. T., 2 W. 4, and they cannot now be considered as law. (See the judgment of Parke, B., in *Jolliffe v. Mundy*, 4 M. & W. 502; 7 Dowl. 225, S. C.)

(*c*) *Trelawney v. Thomas*, 1 H. Bl. 641: *Hudson v. Marjoribanks*, 1 Bing. 393; 8 Moore, 440, S. C.: *Canham v. Fisk*, 2 C. & J. 126; Id. 128, n.: *Sherlock v. Barned*, 8 Bing. 21.

(*d*) *Austen v. Gibbs*, 8 T. R. 619: *Chapman v. Partridge*, 2 N. R. 382: *Bird v. Appleton*, 1 Eist, 111: *Howarth v. Samuel*, 1 B. & Ald. 566: *Dodd v. Neal*, 2 C. & M. 225.

(*e*) *Hudson v. Marjoribanks*, 8 Moore, 440; 1 Bing 393, S. C.

BOOK IV.
PART I.

event be the same as on the first trial, the party will be entitled to the costs of the first trial (*f*). After a verdict for a defendant, the court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial: the record was carried down to the Spring assizes following, and made a *remanet*: it was tried a second time at the Summer assizes, when a verdict was again found for the defendant. The court afterwards ordered that the verdict should be set aside, and a new trial had between the parties, upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial: upon the third trial a verdict was found for the plaintiff; and the court held, that the plaintiff was entitled to the costs occasioned by the cause having been made a *remanet* at the assizes next following the term when the first rule was made absolute for a new trial (*g*).

Double Costs
of first Trial.

In an action upon a statute which gives double costs, if a new trial be granted on a rule ordering the payment of the costs of a first trial generally, it would mean the double costs (*h*).

Recovery
&c., of Costs
of first Trial.

When a new trial is granted to the defendant on payment of costs, the plaintiff should not carry down the cause for trial until they are paid; for if he do so, he will have no remedy for the costs of the former trial, even though he should again obtain a verdict (*i*). In the Court of Queen's Bench, if a new trial be granted on payment of costs, the court will not point out in the rule a particular day on which the costs must be paid (*k*).

Amount of
the Costs, &c.

Where a rule for a new trial has been obtained on payment of costs, there is a broad distinction between costs of the trial and costs in the cause; the costs of the pleadings, for instance, are never allowed. Costs of obtaining admission of documents, and of giving notice to produce documents at the first trial of an action, are costs in the cause; but costs of preparing briefs may be allowed as costs of the trial when the necessity for doing so is shewn (*l*). Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the master, in taxing costs, may allow fees on the second trial with reference to those given on the first (*m*). Costs of resisting an unsuccessful application for a new trial are costs in the cause (*n*).

5. *Venire de novo*.5. *Venire de novo*.

The *venire de novo* is the old common law mode of proceeding to a second trial, and differs materially from the granting a new trial, inasmuch as the *venire de novo* is awarded for some defect appearing upon the face of the record, while a new trial is granted for matter entirely extrinsic. A *venire de novo* is not awarded for every defect appearing upon the face

(*f*) *Meule v. Goddard*, 5 B. & Ald. 766. 915.

(*g*) *Gibbons v. Phillips*, 8 B. & C. 437: see *Robinson v. Day*, 5 B. & Ad. 814.

(*h*) *Semble, Loader v. Thomas*, 1 C. & J. 54.

(*i*) *Doe Davie v. Haddon*, Tidd, 9th ed.

(*k*) *Bland v. Warren*, 6 Dowl. 21.

(*l*) *Lord v. Wardle*, 6 Dowl. 174.

(*m*) *Wilkinson v. Malin*, 2 Dowl. 65:

see *Lord v. Wardle*, 6 Dowl. 174.

(*n*) *Eyre v. Thorp*, 6 Dowl. 768.

of the record, but for a defective finding in the verdict only (o). If a verdict be entered generally on all the counts in a declaration, and entire damages given, and one of the counts be bad, the court will not arrest the judgment, but will award a *venire de novo* (p). But a *venire de novo* cannot be awarded, where general damages are assessed, upon a declaration containing a misjoinder of counts (q). And it cannot be granted by a court of error, on a proceeding out of an inferior court (r). But it may be granted on error out of a superior court, such as the Queen's Bench, Common Pleas, or Exchequer. Thus, where on a bill of exceptions as to the admissibility of evidence, the evidence was held inadmissible, the court awarded a *venire de novo* (s). And the same where there was a misdirection (t). And the same, where, on a bond conditioned for the performance of covenants under the 8 & 9 W. 3, c. 11, the jury omitted to assess damages for the breach (u). Where the verdict can be amended, a *venire de novo* is never awarded (x). An application for a *venire de novo* may be made by the plaintiff on a subsequent day, in the same term, after a rule for arresting the judgment has been made absolute (y). Where a *venire de novo* is awarded, the party succeeding at the second trial is not entitled to the costs of the first (z).

- (o) *Goodtitle v. Jones*, 7 T. R. 52: *Witham v. Lewis*, 1 Wils. 55: see *Rex v. Woodfall*, 5 Burr. 2661: *Holt v. Scholefield*, 6 T. R. 691: *Crowder v. Rooke*, 2 Wils. 144: *Hicks v. Keats*, 6 D. & R. 68; 4 B. & C. 69, S. C.: *Eichorn v. Lemaitre*, 2 Wils. 367.
- (p) *Ante*, Vol. I. 324.
- (q) *Corner v. Showe*, 6 Dowl. 688; 4 M. & W. 163, S. C.
- (r) *Trevor v. Wall*, 2 Doug. 732, n.; 1 T. R. 151, S. C.: *per Coltman, J., Strother v. Hutchinson*, 4 Bing. N. C. 92: see *Davies v. Pierce*, 2 T. R. 125; 2 Doug. 732, n.: *Roles v. Rosewell*, 5 T. R. 540: *Hardy v. Bern*, Id. 636.
- (s) *Davies v. Pierce*, 2 T. R. 125.
- (t) *Davies v. Lowndes*, 4 Bing. N. C. 478.
- (u) *Hardy v. Bern*, 5 T. R. 636.
- (x) See as to such amending, *post*, 1130.
- (y) *Corner v. Showe*, 4 M. & W. 163; 6 Dowl. 688, S. C.
- (z) *Edwards v. Brown*, 1 C. & J. 354; 1 Tyr. 281; 1 Dowl. 282, S. C.: *Lickbarrow v. Mason*, 6 T. R. 131: *Bird v. Appleton*, 1 East, 111: *Dadd v. Crease*, 2 C. & M. 225; *Hullock*, 391, 392.

CHAPTER XXVIII.

BOOK IV.
PART I.

JUDGMENT NON OBSTANTE VEREDICTO.

What and in
what Cases
granted.

WHERE the defence put upon the record is not a legal defence to the action in point of substance, and the defendant obtains a verdict, the court, upon motion, will give the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits of the case be very clear. But where the plea contains no confession of the cause of action, the proper course is to award a repleader, and not to give judgment *non obstante veredicto* (a). And after a reference at *Nisi Prius*, and award, the plaintiff cannot move for judgment, *non obstante veredicto*, on an issue directed to be entered for the defendant; the power of the arbitrator being complete and final (b). And it seems that the defendant cannot in any case obtain judgment *non obstante veredicto*, however insufficient the plaintiff's pleadings may be; and that his proper course is to move in arrest of judgment (c).

The Motion,
Argument,
Rule, &c.,
for.

By *R. H., 2 W. 4, r. 65*, "no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term." Where a cause is tried in vacation, the motion must be made within the first four days of the ensuing term; inasmuch as the above rule applies to cases in vacation as well as in term (d). *The motion is for a rule to shew cause; which, after argument, is made absolute or discharged, as in ordinary cases.* On this motion the court will look at the record as it stood at the time of trial, and not as it stood at the time of pleading; *ex.gr.* where there were two counts for 10*l.* each, and damages were laid at 20*l.*, and defendant pleaded payment of 10*l.*, and plaintiff entered a *nolle prosequi* as to one count before trial, and defendant obtained a verdict, the court refused to give judgment *non obstante veredicto* (e).

Form of, and
Writ of In-
quiry on.

The judgment is interlocutory; after which a writ of inquiry must be executed, and final judgment signed, as in ordinary cases (f). If the plaintiff obtain judgment on all the pleas, he may execute a writ of inquiry to assess his damages without leave of the court; but if the defendant has succeeded on any of his pleas, he will be entitled to retain his verdict on them; and there must be a *venire de novo* (g). If the damages be not material, as if the action have been

(a) *Plummer v. Lee*, 2 M. & W. 495.

(b) *Steeple v. Bonsall*, 4 Ad. & El. 950.

(c) *Rand v. Vaughan*, 1 Bing. N. C. 769, per Tindal, C. J.

(d) See *Thomas v. Jones*, 4 M. & W. 28: and the previous cases of *Weston v. Foster*, 5 Dowl. 54: *Brook v. Finch*, 6 Dowl. 313.

(e) *Wright v. Acres*, 1 Nev. & P. 761.

(f) See *Clement v. Lewis*, 3 B. & B. 297; 7 Moore, 200, S. C. There is no occasion for leave of the court to execute the inquiry. (*Shepard v. Halls*, 2 Dowl. 453). See the forms, Chit. Forms. 624.

(g) *Per Parke, B., Shepard v. Halls*, 2 Dowl. 453.

brought to try a right or custom, or the like, the court will set aside the verdict, and enter a verdict for the plaintiff with nominal damages (*h*). CHAP. XXVIII.

On judgment *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues (*i*). Costs of.

(*h*) *Selby v. Robinson*, 2 T. R. 758; 6 69; 9 Bing. 667; 2 Dowl. 206, S. C.; and Co. 59 b. see *Da Costa v. Clarke*, 2 B. & P. 376:

(*i*) *Goodburne v. Bowman*, 3 Moo. & Sc. *Kirk v. Nowell*, 1 T. R. 266.

CHAPTER XXIX.

ARREST OF JUDGMENT.

BOOK IV.
PART I.In what
Cases.

THE court, upon application, will arrest the judgment for any matter intrinsic appearing upon the face of the record (*a*), amounting to a defect not amendable or aided at common law or by statute, and for which a writ of error would lie. If, however, some counts in a declaration are bad and some good, and general damages be given, if this cannot be amended from the judge's notes, the court will not arrest the judgment, but will award a *venire de novo* (*b*). But a *venire de novo* cannot be awarded where general damages are assessed upon a declaration containing a *misjoinder* of counts, and in such a case, therefore, the judgment will be arrested (*c*). As to the defects which are amendable or aided at common law and by statute, see the following Chapter. After judgment upon a demurrer, however, you cannot move in arrest of judgment whether the demurrer were argued (*d*) or not (*e*); but you may after judgment by default (*f*).

The Motion,
Rule, &c.

By rule of all the courts of *H. T.*, 2 *W. 4*, *r. 1*, *s. 65*, "no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed, after the expiration of *four days* from the time of trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term." The rule applies to trials out of term, as well as in term. All such motions, therefore, in any of the courts must now be made in the first four days of term which occur next after the trial (*g*). If the cause was tried *out of term*, then the motion must be made within the first four days of the term ensuing the trial (*h*). Where there were several issues in law and in fact, and the issues in fact were tried first, the court held that the defendant could not move in arrest of judgment, until after the demurrers had been determined (*i*). In moving for a new trial, if there be any ground for arresting the judgment, the rule should be obtained in the alternative for a new trial, *or* for an arrest of judgment (*k*).

(*a*) See *Newball v. Adams*, 8 Taunt. 235.

(*b*) *Leach v. Thomas*, 2 M. & W. 427; *Airey v. Feansides*, 6 Dowl. 654; 4 M. & W. 168, S. C.; overruling *Holt v. Scholfield*, 6 T. R. 691, &c.

(*c*) *Corner v. Showe*, 6 Dowl. 584, 688; 4 M. & W. 163, S. C.

(*d*) *Edwards v. Blunt*, 1 Str. 426.

(*e*) *Creswel v. Packham*, 6 Taunt. 650; 2 Marsh. 326, S. C.

(*f*) *Edwards v. Blunt*, 1 Str. 425.

(*g*) *Thomas v. Jones*, 4 M. & W. 28: see the doubt, *Brook v. Finch*, 6 Dowl. 313.

(*h*) *Weston v. Foster*, 2 Bing. N. C. 701; 3 Scott, 164; 5 Dowl. 54, S. C., C. P. According to the case of *Taylor v. Whitehead*, (2 Doug. 745), the motion in the Queen's Bench might have been made on

any day before judgment was actually signed; but this decision was disapproved of and questioned in the above case of *Weston v. Foster*, and, it seems, is not correct. In *Lane v. Crockett*, (7 Price, 566; 1 Tyr. 225, n.), the Court of Exchequer held that the motion could not be made after an unsuccessful motion for a new trial; and although the contrary is laid down in Manning's Exch. Pract. 353, that seems to be a correct decision; so that, on the whole, the practice in all the courts upon the point seems to be that laid down in the above text. (*Thomas v. Jones*, 4 M. & W. 28).

(*i*) *Goodwright v. Hodgson*, Andr. 282.

(*k*) See *ante*, 1100: *Weston v. Foster*, *supra*.

We have seen (*ante*, Vol. I. 331) that, by the 1 W. 4, c. 7, s. 2, the judge before whom the action is tried may certify before the end of the sittings or assizes that execution ought to issue forthwith, in which case judgment may be signed and execution issued according to the terms of the certificate, but that the court may arrest such judgment, and restore the party to all (if any) he has lost thereby.

CHAP. XXIX.

After Certificate for immediate Execution.

If judgment be arrested, each party pays his own costs (*l*). But where the plaintiff obtained a verdict in the Exchequer, wherein judgment was arrested, which judgment was reversed by the Court of Exchequer Chamber, it was held that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Exchequer (*m*).

Costs on.

(*l*) *Cameron v. Reynolds*, Cowp. 407; (*m*) *Adams v. Meredith*, 3 Y. & J. 419. Gilb. C. P. 272.

CHAPTER XXX.

AMENDMENT AND JEOPAILS.

SECT. 1. *Amendment, &c., generally.*2. *Amendment, &c., of particular Proceedings.*

SECT. 1.

*Amendment, &c., generally.**When and how, 1112.**What amendable at Common Law, 1115.**What amendable by Statute, id.**What aided at Common Law, 1116.**What aided by the Statutes of Jeopails, id.*BOOK IV.
PART I.When and
how.

[*When and how.*] AT any time before judgment, in ordinary cases, the proceedings may be amended by a judge at chambers, upon summons calling upon the opposite attorney to shew cause why the party applying should not have leave to amend; in other cases the amendment may be obtained by application to the court (*a*). The parties cannot in general take upon them to amend their own proceedings, without leave of the court or a judge (*b*).

After Demur-
rer.

After *demurrer*, general or special, and before argument, it is usual to give the other party leave to amend on payment of costs (*c*); and it has been given in many cases even after demurrer argued, and even after a *cur. ad. vult* (*d*), but before judgment, where the justice of the case required it (*e*). The court, however, have refused this to a plaintiff in a *qui tam* action (*f*); in an action against bail (*g*), and in a hard action (*h*); and to a defendant after the plaintiff had lost a trial (*i*). The party demurring, also, has been allowed to strike out a *similiter* which was entered in the issue by mistake (*j*).

(a) See form of the rule, Chit. Forms, 627.

(b) See *Siggers v. Sansom*, 2 Dowl. 745; *Bate v. Bolton*, 4 Dowl. 677; *Wright v. Skinner*, 5 Dowl. 92.

(c) *Ante*, 665; *Hutton v. Walker*, 2 Str. 846; *Bishop v. Stacy*, Id. 954; *Herbert v. Griffiths*, Id. 1181; *Watson v. Richardson*, 1 Wils. 226; see *Drummond v. Dorant*, 4 T. R. 360.

(d) *Rivis v. Watson*, 5 M. & W. 255.

(e) 2 Saund. 5th ed. 402, and cases there cited; *Bishop v. Stacy*, 2 Str. 954; *Howell v. M'Ivers*, 4 T. R. 690; *Steel v. Sowerby*, 6 T. R. 173; *Hunt v. Puckmore*, Barnes, 155; *Matravers v. Fossett*, 3 Wils. 295; *Hamilton v. Wilson*, 1 East,

391; *Potten v. Bradley*, 2 Moo. & P. 78, 81; *Edmonds v. Walter*, 2 Chit. Rep. 292; *Morant v. Sign*, 2 M. & W. 95, and note. And the court have allowed the amendment, without costs, even after argument. (*Hrydon v. Thompson*, MS., K. B., 9th Nov. 1833; and see *Solomons v. Lyon*, 1 East, 369; *post*, 1124). See form of rule, Chit. Forms, 627.

(f) *Rex v. Holland*, 4 T. R. 459; *Evans v. Stevens*, Id. 228; *Wood v. Grimwood*, 10 B. & C. 689.

(g) *Saxby v. Kirkus*, Say. 117.

(h) *Noble v. King*, 1 H. Bl. 37.

(i) *Jordan v. Twells*, Hardw. 171.

(j) *Stevens v. Hudson*, (*Bail of*), 2 Ld. Raym. 1137.

Also, under particular circumstances, the court have allowed the defendant to withdraw his demurrer, and plead *de novo*, even after argument (*k*). And an amendment of a plea has been allowed even after judgment on demurrer, though this seems an extreme case (*l*); and it seems that in such a case an amendment will not be granted unless there be an affidavit of merits (*m*). What has been now mentioned holds good also where there are several issues in law and in fact, even after argument of the issues in law, but before the trial of the issues in fact; but if the issue in fact be tried first, and contingent damages assessed as to the demurrer, the court, it seems, will not in that case allow either of an amendment, or of the demurrer being withdrawn (*n*). The court would, under circumstances, refuse to allow a defendant to amend after a second demurrer to the same pleading (*o*).

The judge at *Nisi Prius*, upon application, may allow the record of *Nisi Prius* to be amended, and may order the clerk of *Nisi Prius* to amend it instantler (*p*), whether the judge who tries the cause be a judge of the court in which the record was made up or not (see 1 *G. 4, c. 55, ss. 5, 6; Vol. I. 39*); and this whether the defect be in a material allegation or not (*q*). And by the 9 *G. 4, c. 15, (Vol. I. 280)*, in cases where a variance may appear between written or printed evidence, and the recital or setting forth thereof on the record, the court or a judge sitting at *Nisi Prius* may order the record to be amended on payment of costs. Also by the 3 & 4 *W. 4, c. 42, s. 23*, already noticed, (*ante, Vol. I. 281*), the court or judge at *Nisi Prius*, where there is a variance between any matter given in evidence (not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced) and the statement of it on the record, may order the record to be amended, &c.

The courts have in particular instances permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea, in cases where there has been nothing to amend by, after issue joined, and after the proceedings have been entered upon record; and even after a trial has been had thereupon. In a case (*r*) after error had been brought in the Queen's Bench, an amendment was made in the record in error (*s*). And in another case (*t*) an amendment after verdict in an action of trover was made, by charging one of fifteen defendants with conversion. Also, in another case (*u*), an amendment by the insertion of a defendant's

(*k*) *Ante*, 665: *Ayres v. Wilson*, 1 Doug. 385; *Waters v. Ogden*, 2 Id. 452; *Alder v. Chip*, 2 Burr. 756; *Cholmeley v. Paxton*, 3 Bing. 1; 2 Moo. & P. 127, S. C.; *sed vide per Littledale, J., Hensworth v. Fawkes*, 1 Nev. & M. 330.

(*l*) *Atkinson v. Bayntum*, 1 Scott, 424; 1 Bing. N. C. 740, S. C.

(*m*) See *per Tindal, C. J.*: *Bramah v. Roberts*, 1 Bing. N. C. 481.

(*n*) *Robinson v. Raley*, 1 Burr. 322; *Baden v. Flight*, 3 Bing. N. C. 35.

(*o*) See *Kinder v. Paris*, 2 H. Bl. 561.

(*p*) See *Murphy v. Marlow*, 1 Camp. 57.

(*q*) *Reid v. Smart*, Chit. Col. Stat. 735; *sed vide Paine v. Busten*, 1 Stark. 74. But, after an order of reference, a judge has no jurisdiction under the 1 *G. 4, c. 55, s. 5*, even during the same assizes, to make a second order to enable the defendant to amend his case by giving a particular of set off. (*Ashworth v. Heathcote*, 6 Bing. 596, n.; 4 Moo. & P. 396, S. C.)

(*r*) *Richardson v. Mellish*, 3 Bing. 334.

(*s*) *Richardson v. Mellish*, 7 B. & C. 819.

(*t*) *Smith v. Fuller*, 1 Ld. Raym. 116.

(*u*) *Tite v. Bishop of Worcester*, Id. 94.

BOOK IV.
PART I.

name, was allowed after verdict. But where a verdict was taken for the plaintiff by consent, and all matters in difference in the cause were referred to an arbitrator, who certified that for the justice of the case the record ought to be amended, by allowing the plaintiff to substitute a replication, putting all the circumstances averred in the plea in issue: the court held, that they had no power to direct such an amendment (*x*).

After Judgment, and before Error.

After judgment and before error brought, a judge at chambers will not, in general, entertain the application, but it should be made to the court; *the rule is a rule nisi, which is afterwards made absolute or discharged, as in ordinary cases.*

After Error brought.

After error brought upon a judgment of one of the superior courts, the application for leave to amend must be made to that court, because the record always in fact remains there, a transcript only being sent to the court of error (*y*); the transcript indeed must be amended, if at all, by the court of error (*z*). After error from an inferior court to the Court of Queen's Bench, the application may be made either to the Queen's Bench, or in the inferior court (*a*).

After error brought, those things are amendable which were amendable before error brought, so long as diminution may be alleged, and a *certiorari* awarded (*b*).

Terms of Amendment, and Remedy for Costs of.

The court or judge, upon granting leave to amend, may oblige the party applying to submit to such equitable terms as may be necessary to prevent the opposite party from being prejudiced by the amendment (*c*). If the amendment be made at the trial, it is with or without costs, at the discretion of the judge; in other cases it is allowed usually upon payment of costs, particularly if the error or mistake have arisen from the default of the party, and not from the misprision of any of the officers of the court. But if the amendment be made after error brought, it is usually upon payment of costs of the proceedings in error, provided the plaintiff proceed no further in his writ of error after notice of the amendment (*d*). If the party who has obtained an order to amend on payment of costs amends, but does not pay the costs, the proper course of the other party, is, either to apply to the court or a judge to stay the proceedings until the costs be paid, or, if he wish to proceed, to apply to have the order of amendment rescinded, and to set aside the amended proceedings as irregular; for the non-payment of the costs, being merely in the nature of a breach of contract, cannot be punished as a contempt, by attachment (*e*); nor, it seems, could the payment be enforced by execution under the 1 & 2 V. c. 110, s. 18. The party who obtains an order to amend in the usual form is at liberty to act upon it, or

(*x*) *Cross v. Metcalfe*, 1 Nev. & P. 232.

(*y*) *Rutter v. Redstone*, 2 Str. 837: Tidd, 714: and see *Anon.*, Cro. Jac. 429: *Grenville v. Smith*, Id. 628: *post*, 1134.

(*z*) See *De Tastet v. Rucker*, 3 B. & B. 65.

(*a*) *Wood v. Matthews*, Poph. 102: Tidd, 9th ed. 714.

(*b*) 8 Co. 162 a: *Richards v. Brown*, 1 Doug. 115: Tidd, 9th ed. 714: Tidd's Sup. 129; and the cases of *Mellish v. Richard-*

son, 7 B. & C. 819; 11 Moore, 104; 3 Bing. 334, S. C.

(*c*) *Alder v. Chip*, 2 Burr. 756: and see 1 Salk. 47: 3 Id. 31: *Havers v. Bannister*, 1 Wils. 7: *Low v. Newland*, Id. 76: *Waters v. Bovell*, Id. 223.

(*d*) *Beaumont v. Cosin*, Barnes, 17: *Parsons v. Gill*, 2 Ld. Raym. 897: see *Moody v. Stracey*, 4 Taunt. 588: Tidd, 715.

(*e*) *Turner v. Gill*, 3 Dowl. 30.

to abandon it, at his option; and if he choose the latter, he may proceed as if the order had not been made (*f*).

CHAP. XXX.
SECT. I.

What Amendable at Common Law.] It may be necessary to premise that amendments in all cases are entirely in the discretion of the court, and are allowed only in furtherance of justice (*g*). At common law, the court may amend in all cases whilst the proceedings are in paper, that is, until judgment signed, and during the term in which it is signed; for until then the proceedings are considered as only *in fieri*, and consequently subject to the control of the court (*h*). And there is no difference in this respect between penal and other actions (*i*); and the court will accordingly permit the plaintiff in a penal action to amend, even after the time limited for bringing another action, provided there have been no unnecessary delay upon his part, and that the amendment required do not introduce any new cause of action (*k*). They have in such actions allowed amendments in names (*l*), in statement of time (*m*), and of the amount lent (*n*), in actions for usury; in the *venire* (*o*), in defective averments (*p*); in the record after verdict (*q*), and in the verdict itself (*r*). But the court have refused to allow an amendment in a penal action after much delay (*s*). Also they refused it in a case where the action was merely within the letter and not within the spirit of the penal act (*t*). After judgment is signed, or after the term in which it is signed, the pleadings, &c., cannot be amended at common law, but by virtue of the Statutes of Amendments only (*u*).

What amendable at Common Law.

In general.

In penal Actions.

What Amendable by Statute.] No process shall be annulled or discontinued for the misprision of the clerks in writing one syllable or letter [or word (*x*)] too much or too little; but as soon as the mistake is perceived, it shall be amended in due form (*y*). And the justices before whom the record is made, or shall be depending by way of error or otherwise, may amend the same, as well after as before judgment, in the same manner as they might have done by the above statute before judgment (*z*). Neither of these statutes, however extends to process of outlawry (*a*). So the court may amend whatever to them seemeth to be the misprision of the clerks in any record, process, word, plea, warrant of attorney, writ, panel, or return, which may for the time be

What amendable by Statute.

Misprision of Clerks.

(*f*) *Black v. Sangster*, 1 C., M. & R. 521; see *Pugh v. Kerr*, 5 M. & W. 164.

(*g*) See *Rex v. Mayor, &c., of Gram-pound*, 7 T. R. 699.

(*h*) *Alder v. Chip*, 2 Burr. 756; *Cope v. Marshall*, Say. 285; 3 Bl. Com. 407; *Tidd*, 697; *Morris v. Evans*, 1 Dowl. 657.

(*i*) *Richards v. Brown*, 1 Doug. 114; *Jones v. Edwards*, 3 M. & W. 218.

(*k*) *Cross v. Kaye*, 6 T. R. 543; *Maddock v. Hammett*, 7 Id. 55; *Wood v. Grimwood*, 10 B. & C. 689; *Tidd*, 9th ed. 711; *post*, 1120, 1121.

(*l*) *Solomons v. Jenkins*, 2 Chit. 23; *Mestaer v. Herts*, 3 M. & S. 450.

(*m*) *Maddock v. Hammett*, *ubi supra*; *Bondfield v. Milner*, 2 Burr. 1098,

(*n*) *Mace v. Lovett*, 4 Burr. 2833.

(*o*) *Dover v. Mestaer*, 4 East, 435.

(*p*) *Jones v. Edwards*, 3 M. & W. 218.

(*q*) *Wright v. Horton*, 6 M. & Sel. 50.

(*r*) *Manners v. Postan*, 3 B. & P. 343.

(*s*) *Wood v. Grimwood*, 10 B. & C. 689.

(*t*) *Matthews v. Swift*, 1 Bing. N. C. 735; 1 Scott, 705; 3 Dowl. 636, S. C. It was an action against an attorney for practising without being duly enrolled.

(*u*) Co. Lit. 260; see *Rex v. Bishop of Llandaff*, 1 Str. 1011.

(*x*) 8 Co. 157 a.

(*y*) 14 Ed. 3, c. 6, s. 1.

(*z*) 9 H. 5, c. 4, s. 1, made perpetual by 4 H. 6, c. 3.

(*a*) 4 H. 6, c. 3.

BOOK IV.
PART I.

before them, so that no judgment shall be reversed by reason of such misprision (*b*). So, they may amend, for the misprision of the clerks and also of other officers, such as sheriffs, coroners, &c., defects in any record, process, or return before them by way of error or otherwise, in writing a letter or syllable too much or too little (*c*). It should also be observed that the word "clerk" imports some officer of the court coming within that description; and therefore the court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, and after judgment in his favour in this court, and error brought, to withdraw the same and plead *de novo* (*d*). In all these cases there must be something to amend by.

What aided
at Common
Law.

[*What aided at Common Law.*] When there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give the verdict, or the jury would have given it; such defect, imperfection, or omission is cured by verdict at common law, or, in the phrase often used upon the occasion, such defect is not a jeofail after verdict (*e*).

Mistakes and defects in proceedings are also often aided by the acts of the opposite party. Thus, where a declaration is defective in point of form, the defect is frequently cured by the defendant in his plea admitting that which was omitted or defectively stated in the declaration; for by admitting it, he waives all objection to the omission or defective statement. This subject shall be noticed in detail in the next section.

What aided
by the Statutes of Jeofails.

In Civil Actions.

[*What aided by the Statutes of Jeofails.*] After verdict, the want of a warrant of attorney, the want of an original writ or bill (*f*), or any defects in form therein, mistakes and omissions in pleadings, misjoining of issue, miscontinuance, discontinuance, misawarding of jury process, and the omission of a *capiatur* or *misericordia* in a judgment, are aided by the several statutes 32 *H.* 8, c. 30; 18 *El.* c. 14; 24 *J.* 1, c. 13; and 16 & 17 *C.* 2, c. 8 (*g*); and the same defects are now aided after judgment by confession, *nil dicit*, or *non sum informatus*, by stat. 4 & 5 *A.* c. 16, s. 2, "so as there be [an original writ or bill (*h*) and] warrants of attorney duly filed." Also, all defects in writs, original (*h*) or judicial, or bills (*h*) are aided after verdict by stat. 5 *G.* 1, c. 13. These several statutes shall be more particularly noticed in the next Section.

In Penal Proceedings.

Of these, the statute 32 *H.* 8, c. 30, extends to penal ac-

(*b*) 8 *H.* 6, c. 12: see *Green v. Rennett*, 1 T. R. 783: *Morse v. James*, Willes, 125.

(*c*) 8 *H.* 6, c. 15.

(*d*) *Green v. Miller*, 2 B. & Ad. 784.

(*e*) 1 *Saund.* 228, 5th ed., and cases there; and 1 *Chit. Pl.* 6th ed. 673 to 682.

(*f*) The original writ or bill is now abolished by the 2 *W.* 4, c. 39, except in ejectment which is founded on original writ or bill, and in actions removed from inferior courts.

(*g*) See *Bull. N. P.* 322, 323.

(*h*) See note (*f*), *supra*.

tions (*i*); but there is a proviso in the others that they shall not extend to criminal proceedings, nor to any writ, bill, action, or information upon any popular or penal statutes, other than such as concern the customs and subsidies of tonnage and poundage (*k*).

CHAP. XXX.
SECT. 2.

Although in some of these statutes the court is directed to amend the defect, yet an actual amendment is never made, but the benefit of the statutes is attained by the court's overlooking the exception (*l*). And for this reason, if error be brought for any defect aided by these statutes, no costs are given to the plaintiff in error, even although the amendment be made; for the court might have given judgment on the writ of error without making the amendment, in the same manner as if the amendment had been actually made (*m*).

Actual
Amendment
unnecessary
under the
Statutes of
Jeofails.

SECT. 2.

Amendment, &c., of particular Proceedings.

<i>Entry of Warrant of Attorney,</i>	<i>Writ of Inquiry,</i> 1126.
1117.	<i>Writ of Trial, id.</i>
<i>Original Writ or Bill,</i> 1118.	<i>Issue,</i> 1127.
<i>Process, id.</i>	<i>Jury Process,</i> 1128.
<i>Appearance,</i> 1119.	<i>Nisi Prius Record,</i> 1129.
<i>Bail-piece,</i> 1120.	<i>Verdict,</i> 1130.
<i>Declaration, id.</i>	<i>Judgment,</i> 1132.
<i>Particulars of Demand, &c.,</i> 1123.	<i>Scire Facias,</i> 1133.
<i>Plea and subsequent Pleadings,</i>	<i>Writ of Error, &c.,</i> 1134.
<i>id.</i>	<i>Execution,</i> 1135.
<i>Notice of disputing Bankruptcy,</i>	<i>Sheriff's Return,</i> 1136.
<i>Patent, &c.,</i> 1126.	<i>Rules, Orders, &c., id.</i>
<i>Demurrer, id.</i>	<i>Affidavits, id.</i>

Entry of Warrant of Attorney.] THE want of a warrant of attorney was aided after verdict by 18 *El. c. 14*, (and see 32 *H. 8, c. 30*), although not perhaps after judgment by default (*a*). Also, any mistake or defect which could be attributed to the misprision of the clerks might be amended, even after error brought, by 8 *H. 6, c. 12*. Thus the court allowed of amendment in the surname of the attorney, and in the addition, in order to make the warrant correspond with the declaration (*b*). And now, by rule of all the courts of *H. T.*, 4 *W. 4, r. 4*, "no entry shall be made on record of any warrants of attorney to sue or defend." And by rule of *H. T.*, 1 *Vict.*, of the Court of Common Pleas, it is ordered "that from and after the last day of this present Hilary term, it shall not be necessary to file warrants of attorney to prosecute and defend previous to or at

Entry of
Warrant of
Attorney.

(*i*) *Wynne v. Middleton*, 2 Str. 1227; 1 Wils. 125, S. C.: *Richards v. Brown*, 1 Doug. 115.
(*k*) See 16 & 17 C. 2, c. 8: *Rez v. Miden*, 1 Str. 62: *Atcheson v. Everitt*, Cowp. 382: *Merrick v. Hundred of Ossulston*, Hardw. 409.
(*l*) 3 Bl. Com. 407.
(*m*) *Conden v. Coulter*, Hardw. 314.
(*a*) See 4 & 5 A. c. 16: see *Bradham v. Taylor*, 1 Wils. 85.
(*b*) *Richards v. Brown*, 1 Doug. 114.

BOOK IV.
PART I.

Infant appearing by Attorney when aided.

the time of signing interlocutory or final judgment, or at any stage of the cause."

If a plaintiff under age appear by attorney, in personal actions or ejectment, it is aided after verdict by 21 *J.* 1, c. 13, and after judgment by confession, *nil dicit*, or *non sum informatus*, by 4 & 5 *A. c.* 16, s. 2.

Original Writ or Bill.

Original Writ or Bill.] When the proceedings by original writ were in existence(*c*), if the original writ were defective through any misprision of the clerks, it might have been amended. (8 *H.* 6, c. 12) (*d*). Also, when the proceedings by bill were in existence(*e*), a bill upon the file might have been amended at any time(*f*). Also, defects and variances in or the want of an original, or a bill, were aided by stat. 16 & 17 *C.* 2, c. 8; 4 & 5 *A. c.* 16, s. 2; 21 *J.* 1, c. 13; 4 & 5 *A. c.* 16, s. 2; 5 *G.* 1, c. 13; 18 *El.* c. 14; 4 *A. c.* 16, s. 2 (*g*).

Plaint in inferior Courts.

As to defects in plaints levied in inferior courts, see *Feathers v. Bryan*, 1 Wils. 180.

Process.

Process.] Before the alteration of process for commencing actions by the 2 *W.* 4, c. 39, process was amendable for misprision of the clerks, at any time, by 14 *Ed.* 3, st. 1, c. 6; 9 *H.* 5, s. 1, c. 4; 8 *H.* 6, c. 12; and 8 *H.* 6, c. 15; provided there were something to amend by(*h*). Thus, before 2 *W.* 4, c. 39, a *capias ad respondendum* might have been amended in the names, (though not in the number) of the parties(*i*), in the *teste*(*k*), in the return(*l*), in the time of recording it(*m*) and the like. So, the court would have amended a non-bailable bill of Middlesex, or *latitat*(*n*). But if a writ were void, for instance, if returnable on a *dies non juridicus*, as in such a case it was altogether void, it could not be amended(*o*). The court might then permit an amendment, even after a rule *nisi* obtained to quash the writ(*p*). Now, however, as we have seen, (*ante*, Vol. I. 522, 120), since 2 *W.* 4, c. 39, the courts have come to a determination not to allow any amendment in the mesne process itself, or in any indorsement thereon prescribed by statute, (and not merely by rule of court), unless in cases where the Statute of Limitations would be a bar(*q*); and indeed in the case of *Roberts v. Bate*(*r*) the Court of Queen's Bench denied their power to amend by adding a de-

(c) See now the 2 *W.* 4, c. 39.

(d) See *Green v. Miller*, 2 B. & Ad. 781; 8 Co. 159: *King v. The Bishop of Cuslile*, Barnes; *Broune v. Hammond*, Id. 10: *Greenwood v. Richardson*, Id. 16: *Losgin Demandant, Rawlins Tenant*, Pullen Vouchee, Id. 22: *Smith v. Wilmer*, 3 Atk. 599.

(e) See now the 2 *W.* 4, c. 39.

(f) See R. M., 10 G. 2, r. 2, b.

(g) See 1 Saund. 318; 2 Saund. 101, r.: *Dickinson v. Plaisted*, 7 T. R. 474: *Boys v. Edmeads*, 2 Chit. Rep. 22: *Ruston v. Ouston*, 2 Bing. 469; 10 Moore, 194, S. C.: *Lapiere v. Germain*, 2 Ld. Raym. 859; 2 Salk. 235; 1 Salk. 50, S. C.

(h) See *Green v. Rennett*, 1 T. R. 782.

(i) *Carr v. Shaw*, 7 T. R. 299: *Rutherford v. Mein*, 2 Smith, 392.

(k) *Bourchier v. Wittle*, 1 H. Bl. 291: *Davis v. Owen*, 1 B. & P. 342.

(l) *Walker v. Hawkey*, 5 Taunt. 853: *Adams v. Luck*, 6 Moore, 113; 3 B. & B.

25, S. C.

(m) *Green v. Rennett*, 1 T. R. 782.

(n) *Cox v. Munday*, 1 W. Bl. 462: *Reubal v. Preston*, 5 East, 291: *Green v. Rennett*, 1 T. R. 782. An amendment in bailable process would not have been allowed without discharging the bail. (*Inman v. Huish*, 2 N. R. 133: *Marsh v. Blachford*, 1 Chit. Rep. 323: *Bradshaw v. Davis*, Id. 374: *ante*, Vol. I. 176: *Hutchinson v. Hyde*, Oct. 10, 1828; Chit. Sum. Pract. 29).

(o) *Kenworthy v. Peppiat*, 4 B. & Ald. 283.

(p) *Walker v. Hawkey*, 5 Taunt. 853: *Adams v. Luck*, 6 Moore, 113; 3 B. & B. 25, S. C.

(q) *Lakin v. Watson*, 2 Dowl. 633: *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564: *Colston v. Berens*, 3 Dowl. 253: *Partridge v. Welbank*, 5 Dowl. 93.

(r) 6 Ad. & El. 778.

fendant, even where the statute would have been a bar to a new action; but *Littledale, J.*, said, that the court might allow informalities or mere verbal mistakes to be amended. The court or a judge will allow an amendment of an *indorsement* of the writ, if that indorsement be one required by a rule of court and not by statute, upon the terms of plaintiff's paying the costs of amendment, and proceedings being stayed until four days after the amendment made (*s*). It has been considered that a judge at chambers cannot amend the *indorsement* of a writ of summons by reducing the amount of the claim indorsed upon it, in order to try the cause before the sheriff (*t*). But, according to more recent decisions, the amendment will be allowed where the case is one proper to be tried before the sheriff (*u*). It would seem that the *capias* prescribed by 1 & 2 *V. c.* 110, *s.* 3, cannot be amended, (unless, perhaps, in case of an error merely clerical), the act being imperative (*r*).

Before the alteration of the process by the above statute, it was usual to alter the return of writs, where they were not executed, and get them re-sealed (*x*); and this, even when writs were stamped, was allowed, provided the writ could have been made returnable as amended, at the time it bore *teste* (*y*). And this may perhaps still be done with the new process, before it is served (*z*). But, according to a late decision, if a defective writ be re-sealed, it ought to be dated of the day of re-sealing (*a*).

Altering and re-sealing Writ.

Although the court may, in some cases, allow the *writ* to be amended, they will not allow an amendment of the *copy* of it after service; for the *copy* is the act of the party, over which the court have no control (*b*).

Copy served not amendable.

After verdict, every defect in a judicial writ, in substance or in form, or variance between it and the declaration, or other proceedings, is aided by 5 *G. 1, c.* 13. So, miscontinuance, discontinuance, or misconveyance of process, is aided after verdict by 32 *H. 8, c.* 30; and even in penal actions, after judgment by confession or default, by 4 & 5 *A. c.* 16, *s.* 2 (*c*).

Aided by Verdict.

As to what will be a waiver of a defect in process, see *ante*, 1082.

Waiver of Defect.

It may, perhaps, be necessary to add, that defects in *mesne* process can never be the subject of a writ of error.

Defect, no Ground for Error.

Appearance.] Where the plaintiff's attorney by mistake entered an appearance for the defendant by a wrong name, the court, upon application, ordered the officer to amend the appearance, the defendant being correctly named in the writ (*d*). Where, however, the defendant entered an appearance by a

Appearance.

(*s*) *Shirley v. Jacobs*, 1 Scott, 67; 3 Dowl. 153, *S. C.*: *Cooper v. Waller*, Id. 167.

(*t*) *Trotter v. Bass*, 3 Dowl. 407; 1 Hodges, 23; 1 Scott, 403, *S. C.*

(*u*) *Edge v. Shaw*, 4 Dowl. 189; 2 *C.*, *M. & R.* 415, *S. C.*: *Frodsham v. Round*, 4 Dowl. 509.

(*v*) See *Roberts v. Bate*, 6 Ad. & EL. 778.

(*x*) *Israel v. Middleton*, 1 Chit. Rep. 321, 398.

(*y*) *Durden v. Hammond*, 2 D. & R. 211; 1 B. & C. 111, *S. C.*

(*z*) *Ante*, Vol. I. p. 119.

(*a*) *Knight v. Warren*, 7 Dowl. 663.

(*b*) *Byfield v. Street*, 10 Bing. 27; 3

Moo. & Scott, 406, *S. C.*: *Nicholl v. Bayn*, 10 Bing. 339; 3 *Moo. & Scott*, 812; 2 Dowl. 761, *S. C.*: *sed vide Hodgkinson v. Hodgkinson*, 3 Nev. & M. 504, *per Taunton, J.*

(*c*) *Humble v. Bland*, 6 T. R. 255.

(*d*) *Wheston v. Packman*, 3 Wils. 49: see *Goodwright v. Wright*, 1 Str. 33: *Stratton v. Burgis*, Id. 114: *Power v. Jones*, Id. 445.

BOOK IV.
PART I.

wrong name, and, instead of applying to have it amended, entered a new appearance, and afterwards signed judgment for want of a declaration, the court set aside his proceedings as irregular(*e*). It may be here observed, that the appearance must strictly follow the forms given by the 2 H. 4, c. 39, in the schedule, or it will be a nullity(*f*). As to when a defect in the appearance is waived, see *ante*, 1047.

Bail-piece.

Bail-piece.] The court have refused to amend the bail-piece in a bailable action, unless with the consent of the bail(*g*); and the Court of Common Pleas have refused it, upon the application of the bail to the sheriff, after an action against them upon the bail-bond and *comperuit ad diem* pleaded(*h*). That court have also refused to allow an amendment of the sum in a bail-piece in error, even with the consent of the bail, the effect of the amendment being merely that, if allowed, the writ of error would be a *supersedeas* of execution(*i*).

Recognition of Bail.

The Court of Common Pleas have also ordered the recognition of bail to be amended, where the application was made on the part of the bail(*k*); but they refused to do so where the bail had not assented to it(*l*).

Declaration.

Declaration.] The declaration may be amended, at common law, in the title(*m*), in the venue(*n*), in the parties' names(*o*), and in the body of the declaration, in form(*p*), or substance(*q*). And this amendment will in general be allowed even in penal actions(*r*), or in an action against the marshal for an escape(*s*), provided the amendment do not introduce any new substantive cause of action, or new charge against the defendant(*t*). But in other actions (provided the bail be not prejudiced) the court will allow the plaintiff to add even a new count, or to strike out a count, upon payment of costs(*u*), and this even after two terms, provided the counts intended to be added contain no new causes of action(*x*). And in a late case, where in an action by a banking company the names of two public officers were improperly put on the record as plaintiffs, the 7 G. 4, c. 45, s. 9, requiring the suit to be carried on in the name of one only, the Court of Common Pleas allowed the name of one of the plaintiffs to be struck out on payment of costs(*y*). And the Court of Common Pleas have, under particular circumstances, allowed

What Amendment allowed.

- (*e*) *Bates v. Bolton*, 4 Dowl. 677.
- (*f*) *Warren v. Lons*, 7 Dowl. 602.
- (*g*) 1 Barnard, 214.
- (*h*) *Bingham v. Dickie*, 5 Taunt. 814: but see *Anderson v. Noah*, 1 B. & P. 31.
- (*i*) *Reed v. Cooper*, 5 Taunt. 320.
- (*k*) *Halliday v. Fitzpatrick*, 4 Taunt. 875.
- (*l*) *Tabrum v. Tenant*, 1 B. & P. 481: *Faget v. Vanthiennen*, Barnes, 59: *Venn v. Warner*, 3 Taunt. 263: but see *Mann v. Calow*, 1 Taunt. 221.
- (*m*) *Coutanche v. Le Rues*, 1 East, 133: *Symmonds v. Parmenter*, 1 Wils. 78: *Stork v. Herbert*, Id. 242: *Wilkes v. Earl of Halifax*, 2 Wils. 256: *Brazier v. Jones*, 6 B. & C. 196.
- (*n*) *Ante*, 736.
- (*o*) See *Smith v. Fuller*, 1 Ld. Raym. 116: Plaintiff, *Gardner v. Walker*, 3 Anst. 935: but see *Moody v. Aslatt*, 3 Dowl. 486: Defendant, *Owens v. Dubois*, 7 T. R. 698.

- (*p*) *Marshall v. Riggs*, 2 Str. 1162: *Stroud v. Tilly*, Id.
- (*q*) *Bondfield v. Milner*, 2 Burr. 1093: *Havers v. Bannister*, 1 Wils. 7.
- (*r*) *Ante*, 1115.
- (*s*) *Barnes v. Eyles*, 2 Moore, 561; 3 Taunt. 515, S. C.: *Brazier v. Jones*, 6 B. & C. 196.
- (*t*) *Cross v. Kaye*, 6 T. R. 544: *Mad-dock v. Hammet*, 7 T. R. 55: see *Wood-ruffe v. Williams*, 6 Taunt. 19: *Horston v. Shilliter*, 6 Moore, 490: *Sweeting v. Halse*, 4 M. & R. 383: *Morris v. Evans*, 1 Dowl. 657.
- (*u*) *Doe Beaumont v. Armitage*, 1 D. & R. 173: *Tidd*, 644: see *Executors of the Duke of Marlborough v. Windmore*, 2 Str. 890: *Brown v. Crump*, 6 Taunt. 300.
- (*x*) MS., E. 1820.
- (*y*) *Holmes v. Pinney*, 6 Dowl. 627: misreported 4 Bing. N. C. 454: but see *Roberts v. Bate*, 6 Ad. & El. 778.

the plaintiff to amend his declaration by changing it from *assumpsit* into debt, even after six terms from the return of the writ (*z*); and they have allowed an amendment at a later period, where the defendant was the cause of the delay (*a*). And in a case where the defendant declared in trespass, instead of case, for an injury occasioned by the negligent driving of the defendant's servant, the Court of Queen's Bench allowed the plaintiff to amend the declaration into case, notwithstanding the application was not made until after two terms from the return of the writ (*b*). But these last-mentioned cases were very peculiar, and were commenced before the form of process prescribed by 2 W. 4, c. 39, in which the form of action is stated in the writ, and must be adhered to in the declaration, and it would seem that since that act no amendment can be allowed which would make the cause of action declared on different from that stated in the writ, unless by consent (*c*). In a recent case the Court of Exchequer, in an action for false imprisonment, refused to allow a count *de bonis asportatis* to be added to the declaration after the lapse of the two terms (*d*). Also, where a jury gave more damages than were laid in the declaration, the court, upon application of the plaintiff, granted a new trial, and gave him leave to amend the declaration by increasing the damages (*e*). But where a verdict was taken for the damages laid in the declaration, subject to an award, the court refused to allow the plaintiff to amend his declaration by increasing the damages, although it appeared from the affidavit that a larger sum would probably be proved before the arbitrator (*f*). As to the amendment of a declaration in ejectment, see *ante*, 736.

The court have entertained the application for an amendment in these respects, even after a plea in abatement for the mistake sought to be amended (*g*), or after issue joined (*h*), or the record taken down for trial and withdrawn (*i*), and even after verdict under particular circumstances (*k*). They have allowed it also after issue joined on *nul tiel* record (*l*); they have also set aside a nonsuit, and allowed the declaration to be amended as to the error for which the plaintiff was nonsuited (*m*); but they have refused to amend the declaration after a motion made to arrest the judgment for the defect (*n*). If there be any defect in the declaration arising from the mis-

Time of Application for.

(*g*) *Billings v. Flight*, 6 Taunt. 419; *Billings v. Pooley*, Id. 422; and see *Atkinson v. Bell*, 2 M. & R. 292, 302; 8 B. & C. 277, S. C.; but see *Green v. Milton*, 4 B. & Ad. 369.

(*a*) *Aylwin v. Todd*, 1 Bing. N. C. 170. The action was on a charter-party.

(*b*) MS.; also another MS., M. T. 1828; but see *Green v. Mitton*, 4 B. & Ad. 369.

(*c*) See as to the necessity of the declaration agreeing with the writ in the cause of action, Vol. I. 145; and see *per Denman*, C. J., in *Green v. Mitton*, 4 B. & Ad. 369.

(*d*) *Conolly v. Finch*, Exch., H. T. 1838; 2 Jurist, 49.

(*e*) *Tomlinson v. Blacksmith*, 7 T. R. 132; and see 2 Chit. Rep. 27 b; *Dew v. Katz*, 8 C. & P. 315.

(*f*) *Pearse v. Cameron*, 1 M. & Sel. 675.

(*g*) *Garner v. Anderson*, 1 Str. 11; *Mestaer v. Hertz*, 3 M. & Sel. 450; *Owens v. Dubois*, 7 T. R. 698.

(*h*) *Executors of the Duke of Marlborough v. Windmore*, 2 Str. 890.

(*i*) *Mace v. Lovett*, 5 Burr. 2833; *Cross v. Kaye*, 6 T. R. 543; *Morris v. Evans*, 1 Dowl. 657; *ante*, 1112.

(*k*) *Wilder v. Handy*, 2 Str. 1151; *Smith v. Fuller*, 1 Ld. Raym. 116; see *Marriott v. Lister*, 2 Wils. 147; *Vicars v. Haydon*, 2 Cowp. 841.

(*l*) *Symonds v. Parmenter*, 1 Wils. 87; *Blackmore v. Flemmyng*, 7 T. R. 447 d; *Doubleday v. —*, 2 Chit. Rep. 27; *Rastall v. Stratton*, 1 H. Bl. 49.

(*m*) *Williams v. Pratt*, 5 B. & Ald. 896; *Halhead v. Abrahams*, 3 Taunt. 81; *Dartnall v. Howard*, Chit. Sum. Prac. 149; *Pullen v. Seymour*, 5 Dowl. 164.

(*n*) *Collins v. Gibbs*, 2 Burr. 890.

BOOK IV.
PART I.Costs of
Amendment
of.What Defects
are aided by
Verdict.

prison of the clerks, it may be amended at any time by leave of the court(o).

Before plea, the declaration may be amended without costs, excepting the costs of the application; after plea or demurrer, it can, in general, be amended only upon the terms of paying costs(p); the court or a judge have, however, the power of ordering the amendment without costs(q).

Having stated what defects in a declaration are amendable, we shall now see what are aided, either at common law or under the statutes of jeofails(r). A declaration is aided at common law, *after verdict*, where there is any defect, imperfection, or omission in it, whether in substance or in form, for which the defendant might have demurred; but the facts so defectively stated or omitted are such as must necessarily have been proved at the trial, in order to entitle the party to the verdict he has obtained(s). Thus, where (before stat. 4 & 5 A. c. 16, s. 9, which rendered attornment unnecessary) an action was brought for rent by the bargainee of a reversion, and the declaration omitted to allege attornment of the tenant, and upon *nil debet* pleaded there was a verdict for the plaintiff, the omission was holden to be cured by verdict(t); but it would have been a fatal objection after judgment by default(u). So, if the grant of a reversion or incorporeal hereditament be pleaded, and it is not alleged to have been by deed, or a feoffment be pleaded without livery, yet if the grant or feoffment be put in issue, and found by the jury, the omission is cured by the verdict(x); but it would be fatal after judgment by default. So in an action for a malicious prosecution, if the declaration do not allege that the prosecution is at an end, it is fatal upon demurrer, or after judgment by default(y), but is cured by verdict(z). So, an ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict(a). But if the plaintiff, in his declaration, either state a defective title, or totally omit to state any title or cause of action whatever, a verdict will not cure the defect either at common law or under the statute of jeofails(b). Thus, in an action on a bill of exchange against the indorser, where a demand upon and refusal by the acceptor was not alleged in the declaration, the omission was holden not to be cured by verdict(c). So, in an action against an heir upon the bond of his ancestor, if the declaration omit to state that the ancestor in his bond bound himself and his

(o) 8 H. 6, c. 12: see 1 Doug. 116: *Moody v. Stracey*, 4 Taunt. 583.

(p) R. M., 10 G. 2, b: and see R. M. 1654, s. 13.

(q) See *Wall v. Lyon*, 9 Bing. 411; 1 Dowl. 714, S. C.

(r) See fully, 1 Chit. Pl. 6th ed. 673 to 682.

(s) *Ante*, 1116.

(t) *Hitchen v. Stevens*, 2 Show. 233: *Rushton v. Aspinall*, 2 Doug. 683; 2 Saund. 305 a, n. (13).

(u) *Vandeput v. Lord*, 1 Str. 78.

(x) *Lightfoot v. Brightman*, Hut. 54: *Spieres v. Parker*, 1 T. R. 145.

(y) *Waterer v. Freeman*, Hob. 267: *Parker v. Langley*, 10 Mod. 209; 1 Doug.

205: *Morgan v. Hughes*, 2 T. R. 225; see 5 Price, 540: *Pipet v. Hearn*, 5 B. & Ald. 634.

(z) 1 Saund. 228 c.

(a) *Lord Huntingtower v. Gardiner*, 1 B. & C. 304; 2 D. & R. 450, S. C.: *Sheen v. Rickie*, 5 M. & W. 175.

(b) *Rushton v. Aspinall*, 2 Doug. 683, 658, 628, n.: *Small v. Cole*, 2 Burr. 1159: *Weston v. Matson*, 3 Id. 1728: *Roe Wrangham v. Hersey*, 3 Wils. 275: *Spieres v. Parker*, 1 T. R. 141—146: *Bishop v. Hayward*, 4 T. R. 472: *Breakey v. Andrews*, 2 Nev. & P. 114: *Tollit v. Shenston*, 5 M. & W. 283.

(c) *Rushton v. Aspinall*, 2 Doug. 679

heirs, the omission is not cured by verdict(*d*). Surplusage, however, does not vitiate after verdict(*e*).

CHAP. XXX.
SECT. 2.

The following defects in a declaration are cured after verdict by the statutes of jeofails, and after judgment by confession or default, by 4 & 5 A. c. 16, s. 2:—mispleading, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attornies (32 H. 8, c. 30); lack of averment of any life, so as the person be proved to be alive (21 J. 1, c. 13); want of form in any count, declaration, plaint, bill, suit, or demand (18 El. c. 14) (*f*); want of profer, or the omission of *vi et armis* (*g*), or *contra pacem*; mistaking the Christian name or surname of either party, sums, day, month, or year, in any bill, declaration, or pleading, being right in the writ, plaint, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the party might have demurred and shewn the same for cause; or the want of *prout patet per recordum*; or the want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid (and which is holden to aid the defect of a mis-trial of a local action in a wrong county (*h*); or any other matters of the like nature, not being against the right of the matter in suit, nor whereby the issue or trial is altered (*i*). But in no case is a declaration aided by these statutes, where the plaintiff either states a defective title, or totally omits to state any title or cause of action in it. (*Supra*).

What Defects cured after Judgment by Confession or Default, &c.

The plaintiff, after obtaining an order to amend his declaration, with leave to defendant to plead *de novo*, may abandon that order and proceed to trial without procuring it to be rescinded (*k*).

Order may be abandoned.

As to the time for pleading after an amendment of the declaration, see *Vol. I.* 157.

Time for Pleading after.

Particulars of Demand, &c.] If a bill of particulars be incorrect, the party who delivered it may have leave to amend it (*l*); or, if not sufficiently explicit, the party may take out a summons, and obtain order for further particulars (*m*).

Particulars of Demand, &c.

As to notice of disputing bankruptcy, notice of objections to patent, &c., see *post*, 1126.

Notices, &c.

Plea and subsequent Pleadings.] Pleas, replications, and subsequent pleadings may be amended at common law, whilst they are in paper, by leave of the court or a judge, upon payment of costs (*n*). They have allowed a plea of a judgment by an executor to be amended in the sum for which the judgment was recovered, although the application was not made until nearly three years after issue joined (*o*); and in an action on a promissory note, the court, after issue joined,

Plea and subsequent Pleadings.

(*d*) 2 Saund. 136, 137 a.

(*e*) Bull. N. P. 321; Cro. Jac. 94.

(*f*) See — v. Lee, 1 Ld. Raym. 211.

(*g*) Parker v. Bailey, 4 D. & R. 215.

(*h*) Mayor &c. of London v. Cole, 7 T. R. 583; Maitland v. Taylor, 2 Ld. Raym. 1212; Bailiffs and Citizens of Litchfield v. Slater, Willes, 431; and see Meller v. Barber, 3 T. R. 387; 1 Saund. 247.

(*i*) 16 & 17 C. 2, c. 8. See 1 Saund. 247 a, and the cases there cited; also 1 Saund. 241 b, 228 a; 2 Saund. 7 a.

(*k*) Black v. Sangster, 1 C., M. & R. 521; 3 Dowl. 206, S. C.

(*l*) See Staples v. Holdsworth, 6 Dowl. 714.

(*m*) Ante, 1034, 1035.

(*n*) Ante, 1115: Low v. Newland, 1 Wils. 76.

(*o*) Skutt v. Woodward, 1 H. Bl. 238; and see Prior v. Duke of Buckingham, 8 Moore, 584; Oldershaw v. Thompson, 1 Stark. Rep. 312; Jones v. Roberts, 2 Dowl. 698.

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allowed a defendant to add a plea, shewing that by the foreign law the plaintiff's right of action was tolled by lapse of time(*p*). And they have allowed a plea to be amended by striking out some averments and inserting others, even after issue joined and witnesses examined on the plaintiff's part on interrogatories, the plaintiff having had notice of the proposed amendment before the examination(*q*). After demurrer, we have seen that it is usual to give leave to amend the plea; and in some cases this has been done even after judgment(*r*). In a case in the Common Pleas, the general issue having been pleaded to an action for an assault, and a verdict found for plaintiff, and a new trial granted on payment of costs, the court would not allow the defendant to withdraw the issue and plead accord and satisfaction(*s*). So, where, in an action of slander, the parties went down to trial on the general issue, and the plaintiff obtained a verdict, the court refused to allow the defendant to amend by adding a plea of justification(*t*). And it seems that the court will not in any case grant the defendant an amendment and new trial for the purpose of enabling him to add a plea, and raise a defence not available to him under the plea on which he went down to the first trial(*u*). The court will not allow a plea in abatement to be amended(*v*).

Replication.

The court have allowed a replication to be amended after the cause had been carried down to trial and made a *remanet*(*x*); and, where a replication to a sham plea was defective, the plaintiff had leave to amend, without payment of costs, after demurrer argued(*y*). A replication of damages ultra to a plea of payment into court may be amended into a replication taking out the money in satisfaction on payment of the defendant's costs incurred subsequently to the plea(*z*). So, *de injuriâ* has been amended into *molliter manus imposuit*(*a*). Even after verdict, the court have allowed of an amendment, by inserting the *similiter* after the replication, instead of an "*&c.*"(*b*); and in a case in the Common Pleas, where the plaintiff had omitted to reply to one of the defendant's pleas, and the defendant added the *similiter* as if the plaintiff had replied, the court allowed the plaintiff to amend, by inserting the replication after verdict, upon payment of costs of the application, the merits of the case having been tried upon the other issue(*c*). The court, however, have refused to allow a replication to be amended after a nonsuit(*d*), and after a verdict set aside, in an action against an executor(*e*). Where a verdict was taken for the plaintiff, and all matters in difference in the cause were referred to an arbitrator, who certified that, for the justice of the case, the record ought to be amended by allowing the plaintiff to substitute a replication, putting all the circumstances averred in the plea in issue, the court held

(*p*) *Huber v. Steiner*, 2 Dowl. 781; 4 Moo. & Sc. 329, S. C.: see *Smith v. Dixon*, 1 Har. & W. 668.

(*q*) *Hollingsworth v. Briggs*, 4 Dowl. 643.
(*r*) *Ante*, 1112.
(*s*) *Price v. Severn*, 7 Bing. 402; 5 Moo. & P. 250; 1 Dowl. 215, S. C.

(*t*) *Kirby v. Simpson*, 3 Dowl. 791.
(*u*) *Ante*, 1094, 1095.
(*v*) *Ante*, 655.
(*x*) *Cope v. Marshall*, Say. 285.

(*y*) *Solomons v. Lyon*, 1 East, 369; *Heydon v. Thompson*, MS., Q. B., Nov. 9,

1833.

(*z*) *Ante*, 975.

(*a*) *Low v. Newland*, 1 Wils. 76.

(*b*) *Sayer v. Pocock*, Cowp. 407; but this amendment seems unnecessary: see *Clark v. Nicholson*, 6 C. & P. 712; *Stockdale v. Chapman*, 4 Ad. & El. 419; *Brook v. Finch*, 6 Dowl. 313.

(*c*) *Cooke v. Burke*, 5 Taunt. 164; and see the cases *post*, 1127, n. (i).

(*d*) *Hutchinson v. Brice*, 5 Burr. 2692.

(*e*) *The Bank of England v. Morris*, 2 Str. 1002.

that they had no power to direct such an amendment (*f*). Nor will the court, in general, allow the replication to be amended in hard actions, particularly after demurrer argued (*g*).

CHAP. XXX.
SECT. 2.

Avowries (*h*) and pleas in bar (*i*), in replevin, may be amended in the same way as pleadings in other actions.

Avowries and Pleas in Bar.

As to withdrawing pleas or replications, and pleading or replying *de novo*, see *Vol. I.* 180.

Withdrawing Pleas, &c.

Also, the pleadings may be amended, at any time, as to defects which, in the opinion of the court, have originated from the misprision of the clerks (*k*). They may be amended by the draft under counsel's hand (*l*), or they might have been so by the paper book, when it used to be made up by the clerk of the papers (*m*).

Misprision of Clerks in.

Pleas, replications, &c., are aided, at common law, after verdict for the party who pleaded them, in the same cases as declarations; namely, where the matter defectively stated or omitted (not amounting to a defective title, or the omission of title) is such as must necessarily have been proved at the trial, in order to entitle the party pleading to the verdict he has obtained (*n*). But where there is a defect, omission, or imperfection, though in form only, in some collateral parts of the pleading that were not in issue between the parties, so that there can be no room to presume that the defect or omission has been supplied by proof, a verdict will not cure it at common law (*o*), although in some cases it would under the statutes of jeofails. Thus, where a replication should have averred that the cattle were *levant et couchant* on the plaintiff's land, and issue was taken on a prescription only, a verdict in favour of the prescription was helden not to aid the omission of this averment at common law (*p*), although it would now be aided by the statutes of jeofails. Also, where a plea confesses the action, but does not sufficiently avoid it, the plaintiff, we have seen, (*ante*, 1108), may move for judgment *non obstante veredicto*.

What Defect in aided by Verdict.

In pleas, replications, &c., the following defects are aided after verdict by the statutes of jeofails, and after judgment by confession or default, by the 4 & 5 *A. c.* 16, *s.* 2; mispleading, lack of colour, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attornies (32 *H.* 8, *c.* 30); lack of averment of any life, so as the person be proved to be alive (21 *J.* 1, *c.* 13); want of profert, or mistaking the christian name or surname of either party, sums, day, month, or year, in any pleading, being right in any writ, plaint, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the other party might have demurred, and have shewn the same for cause; want of the averment of "*hoc paratus est verificare*," or of "*hoc paratus est verificare per recordum*," or for not alleging "*prout patet per recordum*," or any other matters of the like nature, not being against the right of the matter of

What Defects in cured by Judgment by Confession, or Default.

(*f*) *Cross v. Metcalf*, 1 Nev. & P. 232.
(*g*) Pr. Reg. 21: 1 Sellon, 275: see *ante*, 1115.

sey v. Bird, Cro. El. 258.

(*m*) 8 Co. 161 b: *Parsons v. Gill*, 1 Salk. 50, 88; 2 Ld. Raym. 895. S. C.: Tidd, 651.

(*n*) See *ante*, 1116: Bull. N. P. 321: 1 Chit. Pl. 6th ed. 673 to 682.

(*o*) 1 Saund. 228 a.

(*p*) *France v. Tringer*, Cro. Jac. 44.

(*h*) *Prior v. Buckingham*, 8 Moore, 584.

(*i*) *Mattravers v. Fossit*, 3 Wils. 295.

(*k*) 8 H. 6, c. 12: *Green v. Miller*, 2 B.

& Adol. 782.

(*l*) *Hatton v. Walker*, 2 Str. 846: *Ram-*

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PART I.

the suit, nor whereby the issue or trial are altered. (16 & 17 *Car.* 2, c. 8).

Notice of disputing Bankruptcy, &c.

Notice of disputing Bankruptcy, Patent, &c.] Even after a trial the court have granted a new trial, and given the defendant leave to plead *de novo* with a proper notice of his intention to dispute the act of bankruptcy, &c., the former notice having been too general (*q*).

Notice of Objections to Patent.

If, in an action for the infringement of a patent, the defendant neglect to deliver, with his pleas, the objections required by the 5 & 6 *W.* 4, c. 83, it seems doubtful if the court have power to allow him to deliver them afterwards, *nunc pro tunc*; but if they are satisfied on the merits, they will grant him leave to plead *de novo*, and then deliver the objections with the fresh pleas (*r*). The court will also, as we have seen, order defendant to deliver better particulars at the instance of the plaintiff (*s*).

Notice of Set-off.

The Court of Common Pleas refused to allow a notice of set-off to be amended, when such notice was in practice (*t*).

Demurrer.

Demurrer.] A demurrer cannot be amended without the consent of the opposite party (*u*). As to amending after argument of demurrer, see *ante*, 1112.

Writ of Inquiry.

Writ of Inquiry.] Defects or errors in a writ of inquiry may be amended by the award of it on the roll (*x*). If the jury, in an action of debt, omit the formal finding of damages which entitles the plaintiff to *costs de incremento*, the court may order the requisite entry to be made on the *postea* (*y*). Where the writ and inquisition were lost, the court ordered new ones to be made out according to the sheriff's notes, and that the costs before taxed should be indorsed by the master (*z*). The want of a writ of inquiry, however, is said to be aided by the statutes of jeofails (*a*).

Writ of Trial before Sheriff.

Writ of Trial before Sheriff.] In a recent case, where a cause (which had been made a *remanet*) was tried before the sheriff on a day subsequent to the return day of the writ of trial, the court allowed an amendment of the writ (*b*). But the safer course, in such a case, is to apply to a judge *before trial* to extend the time for the return of the writ (*c*). Where the writ of summons was mis-recited in the writ of trial, but the defendant appeared at the trial, the court allowed the plaintiff to amend the writ of trial by inserting the right date of the writ of summons (*d*). Where the plaintiff deli-

(*q*) 6 B. & C. 537, n.: and see the cases *ante*, 901, 903.

(*r*) *Losh v. Hay*, Exch., H. T. 1838; 2 Jurist, 157.

(*s*) *Bulnois v. M'Kenzie*, 6 Dowl. 215; *Fisher v. Hewit*, 6 Dowl. 739.

(*t*) *Anon.*, Barnes, 294. The defendant must now, in all cases, plead a set-off. (*Graham v. Partridge*, 5 Dowl. 108).

(*u*) *Maynard v. Hopkins*, Say. 46.

(*x*) *Johnson v. Toulmin*, 4 East, 173; *Conden v. Coulter*, Hardw. 314; *Hughes v. Alvarez*, 1 Str. 684; *Ingham v. Chishull*, Barnes, 15; *Pippett v. Hearn*, 1 D. & R. 266.

(*y*) *Bale v. Hodgetts*, 1 Bing. 182; 7 Moore, 602, S. C.

(*z*) *Bean v. Elton*, 2 Str. 1077.

(*a*) *Iles v. Pitt*, 2 Ld. Raym. 1397; *Mallory v. Jennings*, 2 Str. 878.

(*b*) *Sherman v. Tinsley*, 4 Scott, 286; but see *Mortimer v. Preedy*, 6 Dowl. 544. It seems that the proper course in such a case is, to apply to a judge to extend the time for the return of the writ. (*Per Parke*, B., *Ibid.*)

(*c*) *Mortimer v. Preedy*, 6 Dowl. 544, *per Parke*, B.

(*d*) *Percival v. Connell*, 1 Jurist, 406.

vered his issue in the form of an issue at *Nisi Prius*, and not in the form prescribed by the rule of court, on a motion to set aside the issue and notice of trial, the court gave the plaintiff leave to amend on payment of costs(*e*). And the Court of Exchequer have held that a variance between the issue and the writ of trial may be amended at any time, if the defendant appeared at the trial, even under protest(*f*). But where the date of the writ of summons was omitted in the issue and inserted in the writ of trial, the Court of Common Pleas after verdict set aside the writ of trial with costs, although the defendant had appeared (under protest) at the trial(*g*). As to the consequence of a mistake in this respect, see further, *Vol. I.* 294.

Issue.] The misjoining of issue, or an issue otherwise informal, is aided after verdict by 32 *H. 8, c. 30(h)*; so are miscontinuance and discontinuance, by 32 *H. 8, c. 30(i)*. The want of a *similiter* is also aided by it, or is at least amendable under statute 8 *H. 6, c. 12(k)*; and even where the plaintiff added a *similiter* to a rejoinder concluding with a verification, instead of taking issue and concluding to the country, the court allowed the record to be amended after verdict(*l*); and where, to an action on a bill, the defendant pleaded no consideration, concluding with a verification; and the plaintiff, instead of replying in denial, merely added the *similiter*, and went down to trial and obtained a verdict, the court held that there was a mis-trial, as no issue had been joined, and that judgment of re-pleader should be given; but they permitted the plaintiff to amend on payment of costs(*m*). Also, if the *similiter* be added in the name of the defendant, instead of the plaintiff, or the contrary, it is aided after verdict by the above statute(*n*), or may be amended(*o*); and an amendment will be allowed to add it, even though wholly omitted(*p*).

The court, we have seen, allow the issue to be amended, even after verdict, if the amendment do not alter the substance of the issues between the parties(*q*). They would, also, when the proceedings by bill existed, allow of an amendment, by the insertion of a special memorandum of the term in which the plaintiff filed his bill, even after error brought(*r*). And where there was a mistake in the title of the issue, the court allowed the plaintiff to deliver a new issue properly intituled(*s*);

Issue.

Misjoinder of.

Informalities
or Omissions
in.

(*e*) *Atwill v. Baker*, 5 Dowl. 462.

(*f*) *Farwig v. Cockerton*, 6 Dowl. 337;
Cox v. Painter, 1 Nev. & P. 581.

(*g*) *Blissett v. Tenant*, 6 Dowl. 436.

(*h*) *Paine v. Bushin*, 1 Stark. 742;
Saund. 319; Bull. N. P. 321; *Cary v. Hinton*, 2 Str. 973.

(*i*) See ante, 1057; *Humble v. Bland*, 6 T. R. 255; 2 Saund. 1 e.

(*k*) *Sayer v. Pocock*, Cowp. 407; *Reader v. Bloom*, 2 Bing. 384; 9 Moore, 741, S. C.; *Wright v. Horton*, 1 Stark. 400; 2 Chit. 25; 6 M. & Sel. 50, S. C.: see vide *Griffith v. Crockford*, 3 B. & B. 1; 6 Moore, 51, S. C.; *Ferrers v. Weal*, 2 Moore, 21.

(*l*) Ante, 1124; *Grundy v. Mell*, 1 New Rep. 28; and see *Cooke v. Burke*, 5 Taunt. 164. Even after verdict, the want of a *similiter* may be aided; and this, though there be no " &c." at the end of the last

pleading. (See *Stockdale v. Chapman*, 4 Ad. & El. 419; and see *Swain v. Lewis*, 3 Dowl. 700; *Brook v. Finch*, 6 Dowl. 313; *Clark v. Nicholson*, 6 C. & P. 712).

(*m*) *Wordsworth v. Brown*, 3 Dowl. 698.

(*n*) *Rawbone v. Hickman*, 1 Str. 551; *Harvey v. Peake*, 3 Burr. 1793; *Birton v. Mandel*, Cro. Jac. 67; Bull. N. P. 320.

(*o*) *Greenwood v. Piggott*, 3 Salk. 31.

(*p*) *Siboni v. Kirkman*, 3 M. & W. 48; 6 Dowl. 98, S. C.: overruling *Cooper v. Spencer*, 1 Stra. 641; and see *Harvey v. Peake*, 3 Burr. 1793.

(*q*) Ante, 1124; *Sayer v. Pocock*, Cowp. 407; *Grundy v. Mell*, 1 New Rep. 28; *Cooke v. Burke*, 5 Taunt. 164.

(*r*) Ante, 1118.

(*s*) *Beaumont v. Stewart*, Barnes, 18.

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PART I.

also, the court or a judge have power, at any stage of the proceedings, to amend an issue, &c., not made up in compliance with the forms given in *R. H.*, 4 *W.* 4; and therefore, where the *Nisi Prius* record did not contain the date of the writ of the summons, it was held that the judge might supply the omission(*t*).

Objection to,
when made,
and how
waived.

If the issue vary from the declaration or other pleading, accepting the issue will be a waiver of all objection on that account(*u*). If it vary from the record of *Nisi Prius*, the objection should be made at the trial, otherwise the court will deem it aided by verdict, or will amend the *Nisi Prius* record by the roll(*x*); and if, in such case, the *Nisi Prius* record agree with the declaration delivered, a variance between it and the issue is not material, even although the objection be made at the trial(*y*).

Repleader,
where the
Issue is im-
material.

An immaterial issue is not aided either at common law or by statute(*z*); but the court in such a case usually grant a repleader; and where a plea raises an immaterial issue, but contains no confession of the cause of action, the proper course is to award a repleader, and not to give judgment *non obstante veredicto*(*a*). And where there are several issues on the record on which issues are taken, but on none of them the cause of action is fully confessed or proved, the court may award a repleader if one of the issues be immaterial(*b*). On a judgment of repleader, neither party is entitled to costs(*a*).

Jury Process.

Jury Process.] The court may amend the jury process, at any time, for defects arising from the misprision of the clerks, by 8 *H.* 6, c. 12(*c*). The *distringas* may be amended by the *venire*, and the *venire* by the award of it on the roll.

What Defects
in aided by
Verdict.

If jury process be awarded to a wrong officer, upon an insufficient suggestion; or if the *venire* be in some part mis-awarded, or sued out of more or fewer places than it ought to be, so as some one place be rightly named; or if any of the jury who tried the issue be misnamed, either in the surname(*d*) (*Vol. I.* 307) or addition, in the jury process or return thereto, so as it be proved that it was the same man who was meant to be returned; or if there be no return to the said process, so as the panel of the jurors' names be returned and annexed to it; (*see* 6 *G.* 4, c. 50, s. 15; *Vol. I.* 252); or if the returning officer's name be not to the return, so as it be proved that the writ was returned by the returning officer; all these several defects are aided after verdict by 21 *J.* 1, c. 13(*e*). Also by 5 *G.* 1, c. 13, every defect or fault in judicial writs, and every variance between them and the other proceedings, is aided after verdict; and as this statute relates to judicial writs generally, it

(*t*) *Cox v. Painter*, 1 Nev. & P. 581: see *Farwig v. Cockerton*, 6 Dowl. 137; 7 C. & P. 767. And as to giving evidence of the date, though not inserted, see *Godfrey v. Clements*, (W., W. & D. 47), which was a case of trial before the sheriff.

(*u*) See *ante*, Vol. I. 203, 204.

(*x*) *Leeman v. Allen*, 2 Wils. 160: see *Drummond v. Birt*, 2 M. & M. 136: *Blisset v. Tenant*, C. P., H. T. 1839; 2 Jurist, 181; *Brooke v. Finch*, 2 Jurist, 234.

(*y*) *Shepley v. Marsh*, 2 Str. 1131: *post*, 1129.

(*z*) Bull. N. P. 321.

(*a*) *Plumer v. Lee*, 2 M. & Wels. 495.

(*b*) See, upon this subject, 2 Saund. 319 b: *Staple v. Hayden*, 2 Salk. 579; 2 Ld. Raym. 922, S. C.

(*c*) See *Bullock v. Parsons*, 2 Salk. 454; 2 Ld. Raym. 1143, S. C.: *Rez v. Roberts*, 2 Str. 1214: *Philips v. Smith*, 1 Id. 136.

(*d*) See *Hill v. Yates*, 12 East, 229.

(*e*) See *Gurney v. Clere*, Cro. El. 259: *Welsh v. Upton*, Id.: *Elliot v. Skipp*, Cro. Car. 338; Bull. N. P. 320, 324.

seemingly includes jury process (*f*). And, lastly, the want of a *venire* is aided after verdict (*g*). If there be no return of the *distringas juratores* by the sheriff or other officer, nor any panel of the jurors therein mentioned, returned and annexed thereto, such defect is a ground of error, and is not cured by any of the statutes (*h*).

CHAP. XXX.
SECT. 2.

Nisi Prius Record.] The court may amend the record of *Nisi Prius* at any time, for a defect arising from misprision of the clerks (*i*). It may be amended by the issue roll, if any (*k*). Where the issue in ejectment was against seven defendants, and the *Nisi Prius* record, by mistake, against five only, the court amended the *Nisi Prius* record, after verdict, by adding the names of the remaining two defendants (*l*). But where the mistake was in the *jurata*, the day of *Nisi Prius* therein not having been altered after the cause was made a *remanet*, and the subsequent trial appeared of course to have been had after the day of *Nisi Prius*, the Court of Common Pleas held the trial to be *coram non judice*, and refused to amend the *jurata* and *distringas*, but awarded a *venire de novo* (*m*). In a recent case, where the *Nisi Prius* record did not contain the date of the writ of summons, it was held that the judge might supply the omission at any stage of the proceedings (*n*). For variance between the *Nisi Prius* record and the issue, the objection must be made at the time of the trial, for the court will not in general set aside the verdict for such a cause, if the defendant appeared at the trial (*o*); and a variance in this respect is wholly immaterial, if the *Nisi Prius* record agree with the declaration delivered (*p*). Where the record and *postea* were lost, the court ordered a new one to be made out from the issue roll and from the associate's notes (*q*).

Nisi Prius Record.
When amended by the Court.

Even before the recent acts (*ante*, 1113), the record might be amended by leave of the judge at *Nisi Prius*, and this even after the cause was called on, provided it was before the jury were sworn (*r*); provided also the alteration proposed were not matter of material allegation (*s*), and the attorney was not aware of the defect in time to have it remedied upon application to a judge at chambers. Formerly, it could be amended only by a judge of the court wherein the record was made up (*t*), but now it may be amended, on circuit, by the judge who is to try the cause, in the same manner

When by the Judge at *Nisi Prius*.

(*f*) See *Waldo v. Harrison*, Barnes, 5.
(*g*) *Gurney v. Clere*, Cro. El. 259;
Welsh v. Upton, Id.: Bull. N. P. 320.

(*h*) *Rogers v. Smith*, 1 Ad. & El. 772;
and see the law and authorities there collected.

(*i*) 8 H. 6, c. 12; 8 H. 6, c. 15: see
Halhead v. Abrahams, 3 Taunt. 81.

(*k*) *Child v. Harvey*, 1 Salk. 48; 1 Ld.
Raym. 511, S. C. The issue roll is now,
to all intents and purposes, abolished by
R. H., 4 W. 4. (*Hodges v. Diley*, 7 Dowl.
555).

(*l*) *Bishop of Worcester's case*, 1 Ld.
Raym. 94; 1 Salk. 48, S. C.: see *Doe v.*
Dolman, 7 T. R. 618.

(*m*) *Crowder v. Rooke*, 2 Wils. 144: see
Child v. Harvey, 1 Salk. 48; 1 Ld. Raym.
511, S. C.: but see *Waldo v. Harrison*,

Barnes, 5.

(*n*) *Cox v. Painter*, 1 Nev. & P. 581;
7 C. & P. 767, S. C.: and see *Farwig v.*
Cockerton, 6 Dowl. 337.

(*o*) *Doe Cotterill v. Wyld*, 2 B. & Ald.
472: *Leeman v. Allen*, 2 Wils. 160: *Jones*
v. Tatham, 8 Taunt. 634: *Farwig v.*
Cockerton, 6 Dowl. 337: *Worthington v.*
Higley, 5 Dowl. 209: *Wight v. Perrers*, 5
Dowl. 463: but see *Wreathock v. Bing-*
ham, Barnes, 476: *Cooper v. Spencer*, 1
Str. 641; 8 Mod. 376, S. C.: *Drummond*
v. Birt, 2 M. & M. 136.

(*p*) *Shepley v. Marsh*, 2 Str. 1131.

(*q*) *Dayrell v. Bridge*, 2 Str. 1264.

(*r*) *Doe Manning v. Hay*, 1 M. & Rob.

243: *Drummond v. Birt*, 2 M. & M. 136.

(*s*) *Paine v. Bastin*, 1 Stark. 74.

(*t*) See *Halhead v. Abrahams*, 3 Taunt. 81.

BOOK IV.
PART I.

as if he were a judge of the court where the action is pending (*u*). And by the 9 *G.* 4, c. 15, and 3 & 4 *W.* 4, c. 42, s. 23, the judge at *Nisi Prius* may, pending the trial, allow the *Nisi Prius* record to be amended on a variance between matters as stated in the record and those proved in evidence (*x*). As to the extent of this power of amendment, and the cases in which it will be exercised, see *Vol. I.* 280, 281, 282, &c. It may be here observed, that the court cannot give judgment according to the very right of the case under the 3 & 4 *W.* 4, c. 42, s. 24, unless application to amend before verdict has been refused (*y*).

Verdict.

Amendment
of, in general,
refused.

Verdict.] The court have in general no authority to amend or alter the verdict actually found by the jury, in point of substance (*z*). The only exception to this is in the case of mayhem, where the court, upon the inspection of the injuries sustained by the plaintiff, may increase the damages given by the jury (*a*). The court have refused to do this in other actions, even where the jury joined in an affidavit, stating their intention to have given such increased damages, and that they conceived their verdict was calculated to give them (*b*). The proper time for explanations of this kind is at the trial (*c*).

Amendment
of, to give the
Finding its
legal Effect.

But when the amendment is only to give the finding of the jury its legal effect, the court will allow it; and therefore, where the plaintiff, being entitled to treble damages, the verdict was taken, by mistake, for single damages only, the court increased the amount accordingly (*d*). And where, in an action for not setting out tithes, the jury found damages to the amount of the single value only, although the court refused to enter the verdict for the treble value, yet they said, that had the jury, instead of finding damages to the amount of the single value only, found that the single value was so much, the court might have ordered judgment to be entered up for treble value as given by the statute (*e*). So, if the jury give greater damages than are laid in the declaration, the court, even after judgment and error brought on that account, will allow the plaintiff to remedy the defect by entering a *remittitur* for the excess (*f*). So, if the jury in *replevin* find according to statute 17 *C.* 2, c. 7, s. 2, but, instead of finding the amount of the rent in arrear and the value of the goods distrained, find damages to the amount of the rent claimed in the *conusance*, the defendant may remedy the defect by obtaining leave of the court to enter his judgment for a return as at common law, or the court will allow him to amend his judgment if already entered as according to the statute, 17 *C.* 2, c. 7, s. 2 (*g*).

(*u*) See 1 *G.* 4, c. 55, ss. 5, 6: *ante*, 5 *Dowl.* 313, *S. C.*
Vol. I. 98.

(*x*) *Ante*, 280, 281, 282, 1112.

(*y*) *Sergeant v. Chafy*, 6 *Nev. & M.*

819.

(*z*) See *Spencer v. Goter*, 1 *H. Bl.* 78:

Sanford v. Porter, *MS.*, *H.* 1820; 1 *Chit.*

351.

(*a*) *Ante*, *Vol. I.* 327.

(*b*) *Jackson v. Williamson*, 2 *T. R.* 281:

and see *Baker v. Brown*, 2 *M. & W.* 199;

(*c*) *Jackson v. Williamson*, 2 *T. R.* 281.

(*d*) *Baldwin & Twine's case*, *Godbolt*, 245.

(*e*) *Sanford v. Clarke*, 2 *Chit.* 352.

(*f*) *Usher v. Dansey*, 4 *M. & Sel.* 94;

MS., *E.* 1815: *Pickwood v. Wright*, 1 *H.*

Bl. 643.

(*g*) *Ante*, 807: *Rees v. Morgan*, 3 *T. R.*

349: *Herbert v. Waters*, *Carth.* 362: *Sheape*

v. Culpepper, 1 *Lev.* 255: and see *Gamon v.*

Jones, 4 *T. R.* 509.

When a mistake is made in recording the verdict, the court may amend it by the judge's notes (*h*), or by the notes of the clerk of assize or associate (*i*), at any time before judgment by the common law (*k*), or after final judgment, and even after error brought (*l*), the mistake, in such a case, arising from the misprision of the clerk. Thus, when the associate imagining the action to be debt instead of covenant, entered 1*l*. damages instead of 17*l*., the court allowed it to be amended by the judge's notes (*m*); and the same where the associate marked wrong damages (*n*). So, where the defendant pleaded the general issue and the Statute of Limitations, and a verdict was found for the plaintiff on the first issue, but no notice taken of the last, the court allowed it to be amended, even after error for this defect, and joinder in error, on payment of costs (*o*). So, where there are several counts in a declaration, some of which are bad, and by mistake a general verdict on all the counts is entered, although evidence was given upon the good counts only, the judge who tried the cause, or, if he refused it, the court may allow the *postea* to be amended by the judge's notes (*p*). And where, in such a case, it appeared from the judge's notes that the jury calculated the damages on evidence applicable to the good counts only, the court amended the *postea*, although it appeared that evidence had been given applicable to the bad counts also (*q*). And the same where there was a misjoinder of counts (*r*). And after verdict in ejectment for a messuage and tenement, the court (pending a rule to arrest the judgment) gave leave to amend by entering a verdict for the messuage only, without obliging the lessor of the plaintiff to release the damages (*s*). The court, however, have refused to entertain an application for entering the verdict upon particular counts, according to the evidence on the judge's notes, after a lapse of eight years, and after judgment had been reversed on error brought for a defect in one of the counts (*t*). And in a penal action, where the jury found a verdict for one penalty, on evidence equally applicable to each of two counts, and the plaintiff applied it to one of the counts which was subsequently found to be bad, the court would not afterwards allow him to enter it up on the other (*u*). And where the evidence is contradictory on the point, such an amendment will not be allowed (*v*).

In a recent case it was held, that if the verdict, in a The Judge

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SECT. 2.
Amendment
of Postea by
Judges
Notes, &c.

(*h*) *Newcombe v. Green*, 2 Str. 1197; 1 Wils. 23, S. C.; *Doe Church v. Perkins*, 3 T. R. 749; *Richardson v. Mellish*, 11 Moore, 104; 7 B. & C. 819; 3 Bing. 334, S. C.

(*i*) *Rex v. Keat*, 1 Salk. 47; *Parsons v. Gill*, Id. 51; 2 Ld. Raym. 895, S. C.; *Sandford v. Porter*, 2 Chit. Rep. 352.

(*k*) *Grant v. Astle*, 2 Doug. 730.

(*l*) *Petrie v. Hannay*, 3 T. R. 749, 659; *Usher v. Dansey*, 4 M. & Sel. 94; MS., E. 1815; *Richardson v. Mellish*, ubi supra. In the latter case the amendment was made after argument in the Court of Error.

(*m*) Bull. N. P. 320.

(*n*) *Newcombe v. Green*, 1 Wils. 33; 2 Str. 1197, S. C.

(*o*) *Petrie v. Hannay*, 3 T. R. 659.

(*p*) *Eldouces v. Hopkins*, 1 Doug. 376; and see *Taylor v. Whitehead*, 2 Id. 746; *Heuley v. The Mayor and Corporation of Lyme Regis*, 3 Moo. & P. 310; 6 Bing. 100, S. C.

(*q*) Vol. I. 324; *Williams v. Breedon*, 1 B. & P. 329; and MS. Exchequer, T. T. 1832.

(*r*) 1 Chit. 625, n.; *Kightley v. Birch*, 2 M. & Sel. 533.

(*s*) *Goodtitle v. Otway*, 8 East, 357; and see *Doe v. Dyball*, 1 Moo. & P. 330; 8 B. & C. 70, S. C.

(*t*) *Harrison v. King*, 1 B. & Ald. 161.

(*u*) *Holloway v. Bennett*, 3 T. R. 448.

(*v*) *Semble, Reece v. Lee*, 7 Moore, 269.

BOOK IV.
PART I.should be
first applied
to.

trial at *Nisi Prius*, be entered by mistake for the defendant instead of the plaintiff, the court above will not interfere to rectify the error; the proper course is to apply to the judge who tried the cause to do so; and if he refuse, then to move for a new trial (*y*). And it seems that in all cases the application to amend the *postea* by the judge's notes should be made to the judge who tried the cause in the first instance (*z*).

Amendment
by Act of
the Party.

The party also may, in some cases, by his own act, remedy the mistake of the jury in giving their verdict. Thus, in a joint action against two, if the jury sever the damages by mistake, the plaintiff may cure the defect by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other (*a*); or, by entering a *remittitur* as to the lesser damages, he may have judgment for the greater damages, against both (*b*). And where a verdict is given subject to an award, the plaintiff may, it seems, alter the verdict and sign judgment according to the award, when made without applying to the court (*c*).

Special Ver-
dict.

A special verdict may be amended by the judge's notes (*d*), by the minutes taken by the clerk of assize or associate (*e*), by the notes of counsel, or even by an affidavit of what was proved at the trial (*f*). So, if a special case be misstated, the parties may have leave to amend it (*g*). For what defects in a verdict the court will award a *venire de novo*, see *ante*, 1107.

Where Postea
lost.

Where the record of *Nisi Prius* with the *postea* indorsed on it was lost, the court ordered a new one to be made out from the issue roll and from the associate's notes (*h*).

Judgment.

Judgment.] The judgment is amendable at common law, in substance or in form, at any time during the term of which it is signed; and after that time, even after error brought, and in *nullo est erratum* pleaded (*i*), it is amendable for misprision of the clerk, by the 8 *H. 6*, c. 12, and 8 *H. 6*, c. 15 (*k*). Where a judgment *de bonis propriis* was entered against an executor, instead of judgment *de bonis testatoris*, the court ordered it to be amended (*l*), even after error brought (*m*). So, where the judgment was "should recover" instead of "do recover," it was allowed to be amended after error brought (*n*). So, where, in debt on bond, judgment was entered by mistake for the penalty as damages, the court al-

(*y*) *Allerton v. Stockdale*, Exch., E. T. 1838; 2 Jurist, 306.

(*z*) *Scougall v. Campbell*, 1 Chit. 283.

(*a*) *Rodney v. Strobe*, Carth. 19; *Mitchell v. Milbank*, 6 T. R. 199; *Dale v. Eyre*, 1 Wils. 306; *ante*, Vol. I. 323.

(*b*) *Johns v. Dodsworth*, Cro. Car. 192; *Sabin v. Long*, 1 Wils. 30.

(*c*) *Post*, 1260.

(*d*) *Manners v. Postan*, 3 B. & P. 343.

(*e*) *Rex v. Keat*, 1 Salk. 47; Bull. N. P. 320; *Sandford v. Porter*, 2 Chit. Rep. 352.

(*f*) *Mayo v. Archer*, 1 Str. 514; see *Cromwell v. Grunsden*, 2 Salk. 462; 1 Ld. Raym. 335, S. C.; *Trevivan v. Lawrence*, 1 Salk. 276; 3 Id. 151; 2 Ld. Raym. 1036, S. C.

(*g*) Vol. I. 320: *Doe Hitchings v. Lewis*, 1 Burr. 617.

(*h*) *Dayrell v. Bridge*, 2 Str. 1264.

(*i*) *Usher v. Dansey*, 4 M. & Sel. 94; *Foster v. Blackwell*, Barnes, 7; *David v. Wilson*, Id. 18.

(*k*) See *Lady Cass v. Title*, 2 Str. 682; *Wentworth v. Stafford*, 1 Ld. Raym. 68; 5 Mod. 147, S. C.; *Mara v. Quin*, 6 T. R. 1; *Dunbar v. Hitchcock*, 3 M. & Sel. 591; *Green v. Miller*, 2 B. & Adol. 781.

(*l*) *Short v. Coffin*, 5 Burr. 2733; 1 Doug. 116, n. (1), S. C.

(*m*) *Green v. Rennett*, 1 T. R. 783; and see *Dunbar v. Hitchcock*, 3 M. & Sel. 591.

(*n*) *Blackey v. Birmingham*, 2 Str. 1132; *Sticer v. Thompson*, Id. 1156.

lowed it to be amended after error brought (*o*). In a recent case the following variances in entering up a judgment—*viz.* that the plaintiff, as to certain “counts” (instead of “issues”) take nothing by his “bill,” (instead of “writ”), and that the “defendant” (instead of “defendants”) recover costs, &c.—were held clerical errors, which, when ascertained by comparison with the record of the proceedings in the cause, the court amended, although the judgment were of a term past, and although a writ of error was pending, in which these and other errors were assigned (*p*). So, where the defendant was found not guilty as to part, and there was no judgment for him as to that part, the court allowed the record to be amended by the verdict (*q*). So, where a verdict was given for more damages than were laid in the declaration, and judgment entered accordingly, the court allowed the judgment to be amended, and a *remittitur* entered for the excess, even after error brought (*r*). They have refused, however, to amend a judgment entered upon a warrant of attorney as to the names of the defendants, though the warrant of attorney was correct in that respect, and the judgment might have been amended by it (*s*). So, where a joint judgment was entered up on several *scire facias* against bail, the court held that it was not amendable after the term of which it was entered (*t*). And the Court of Common Pleas have refused to amend a judgment against an executor, where the amendment would be to his prejudice (*u*). The judgment may be amended by the verdict (*x*), or by the judgment paper.

After verdict or judgment by confession, (and after judgment by default, by 4 & 5 A. c. 16, s. 2), the want of a *miserecordia* or *capiatur* (*y*), or the entry of one for the other (*z*), or the entry of “*ideo concessum est per curiam*” for “*ideo consideratum est per curiam*,” or the increased costs after verdict or after nonsuit in replevin not being entered to be at the request of the party for whom judgment is given (*a*), or the costs in any action not being entered to be by consent of the plaintiff; these, and “all other matters of the like nature,” not being against the right of the matter of the suit, nor whereby the trial or issue are altered, are aided by 16 & 17 C. 2, c. 8 (*b*).

Where the judgment roll was lost, the court allowed it to be supplied by a new entry (*c*).

What Defects
in aided by
Verdict, &c.

New Entry
where Roll
lost.

Scire Facias.] The court have a power of amending a *scire facias*, for any misprision of the clerks, by stat. 8 H. 6, c. 12, already mentioned, that statute expressly including “writs” generally (*d*). They have accordingly allowed a *scire facias* to revive a judgment, and the declaration thereon to be

Scire Facias.

(*o*) MS., E. 1814.

(*p*) *Paddon v. Bartlett*, 3 Ad. & Ell. 387.

(*q*) *Smith v. Fuller*, 2 Str. 786.

(*r*) *Ante*, 1132.

(*s*) *Sale v. Crompton*, 2 Str. 1209; 1 Wils. 61, S. C.

(*t*) *Villars v. Parry*, 1 Ld. Raym. 182, 547; Comb. 397, S. C.

(*u*) *Burroughs v. Stevens*, 5 Taunt. 554; *Prince v. Nicholson*, 6 Taunt. 45; 1

Marsh. 401, S. C.

(*x*) *Smith v. Fuller*, 2 Str. 786.

(*y*) *Parsons v. Gill*, 1 Salk. 50; 2 Ld.

Raym. 895, S. C.

(*z*) See *Hackett v. Marshall*, 1 Str. 313.

(*a*) See *Tully v. Sparkes*, 2 Str. 869.

(*b*) See Vol. I. 336.

(*c*) *Douglas v. Yallop*, 2 Burr. 722; *Evans v. Thomas*, 2 Str. 833.

(*d*) See *ante*, 1115; *Thorpe v. Hook*, 1 Dowl. 501.

BOOK IV.
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amended(e), and this although execution thereon has been executed and returned(f); and where the *scire facias* is an original proceeding, it may be amended in all cases where an amendment of an original writ would be allowed(g); and the amendment will be allowed although after *nul tiel* record pleaded(h). And where the assignees of a bankrupt issued a *scire facias* to revive a judgment obtained by the bankrupt before his bankruptcy, but omitted to make the official assignee a co-plaintiff, the court, though after issue joined, allowed an amendment by inserting his name, with liberty to the defendant to plead *de novo*(i). But the court have refused to allow a *scire facias* on a recognisance of bail to be amended, in order that the bail might have a further time to render their principal(k). In this case, therefore, and in all other cases where leave to amend will not be granted, the plaintiff, if *nul tiel* record be pleaded, should move to quash the writ.

What Defect
aided by Ver-
dict, &c.

If the defendant plead to the *scire facias*, and the plaintiff proceed to trial, after verdict all defects in form and substance by 18 *El. c. 14*, and defects both in form and substance by 5 *G. 1, c. 13*: and the defects aided after verdict by 18 *El. c. 14*, are now aided, after judgment by confession or default, by 4 & 5 *A. c. 16, s. 2(l)*.

Writ of Error,
&c.

What Defect
amendable.

[*Writ of Error, &c.*] A writ of error was not amendable at common law(m); but now, by the 5 *G. 1, c. 13*, all writs of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts where such writs of error shall be made returnable. Therefore, where a writ of error was brought jointly with one who should not have been joined, the court allowed the writ to be amended by striking out his name(n). So, a mistake in the name of one of the parties has been amended(o); in another case the writ was amended by adding parties(p); and in another, by altering even the description of the form of action(q). But where the writ is returnable before judgment is given, this is a fault which cannot be amended(r).

In what
Court.

According to the statute, the writ is to be amended by the court in which it is returnable; yet this seems to be only in

(e) *Braswell v. Jeco*, 9 East, 316: see *Perkins v. Petit*, 2 B. & P. 275, and the cases there cited; see *Klos v. Dodd*, 1 H. & W. 342; 4 Dowl. 67.

(f) *Thorpe v. Hook*, 1 Dowl. 501.

(g) *Butom v. Hoskins*, 6 Mod. 263: *Reg. v. Aires*, 10 Mod. 258, 354: *Rex v. Eyre*, 1 Str. 43; 6 Bac. Abr., Sci. Fa. D.

(h) *Hampson v. Chamberlain*, Barnes, 3: *Sweetland v. Beezeley*, Id. 4: *Braswell v. Jeco*, 9 East, 316.

(i) *Holland v. Phillips*, 2 Per. & D. 336.

(k) *Grey v. Jefferson*, 2 Str. 1165: *Bond v. Turner*, 8 Mod. 305: *Stevenson v. Grant*, 2 New Rep. 103: *Fulwood v. Anniss*, 3 B. & P. 321: but see *Sweetland v. Beezeley*, Barnes, 4: *Perkins v. Petit*, 1 B. & P. 275.

(l) See 6 Bac. Abr., Sci. Fa. D.

(m) *Thompson v. Crocker*, 1 Salk. 49; 1 Ld. Raym. 564, S. C.: *Walter v. Stokoe*, Id. 71; 5 Mod 16, 69, S. C.

(n) *Sword Blade Company v. Dempsey*, 2 Str. 892; Fitzg. 201; 1 Barnard, 405, 421, S. C.: *Verelst v. Rafael*, Cowp. 425: *Rafael v. Verelst*, 2 W. Bl. 1067.

(o) *Barnard v. Guy*, 2 Smith, 259.

(p) *Lady Cass v. Title*, 2 Str. 682: and see *Baker v. Neaver*, 1 Dowl. 617; 1 C. & M. 112, S. C.: but see *Lady Cass v. Title*, 1 Str. 606: *Ginger v. Couper*, 2 Ld. Raym. 1403; 1 Stra. 606, S. C.: *Elkins v. Payne*, 2 Ld. Raym. 1532: *Walter v. Stokoe*, 1 Id. 71; 5 Mod. 69, S. C.: *Hackett v. Hearne*, Carth. 8: *Rex v. Inhabitants of All Saints, Derby*, 2 Str. 1110: *M'Namara v. Fisher*, 8 T. R. 302.

(q) *Sampayo v. De Payba*, 5 Taunt. 82.

(r) *Wright v. Canning*, 2 Str. 807; 2 Ld. Raym. 1531; 1 Barnard, 62, 65, S. C.: *Rejindoz v. Randolph*, 2 Str. 834: *Vice v. Burton*, Id. 891: *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179. And see Vol. I. 353.

cases where the original record, and not a transcript merely, is removed into such court; and therefore, upon a writ of error from the Queen's Bench to the Exchequer Chamber, it was holden that the writ should be amended in the Court of Queen's Bench, where the original record lay (*s*).

CHAP. XXX.
SECT. 2.

Upon amending a writ of error, new bail must be put in to the amended writ, in the court below (*t*). The amendment in this case is now allowed, as a matter of course, without costs (*u*); but, if the rule be also to amend the assignment of errors, it is upon payment of costs (*x*).

Bail on.
Costs of.

If the court give the defendant in error leave to amend the original record, after the plaintiff has transcribed, they will also order the same amendment to be made in the transcript (*y*). Or if there be any error in the transcript, arising from the misprision of the clerk, the court will order the master to amend it, and order the record below to be produced before him for the purpose of his making the amendment by it (*z*). And where the clerk of the errors below amended the transcript himself in such a case, without any order from the court to that effect, and after the defect in the transcript had been assigned for error, the Court of Queen's Bench refused to order the transcript to be restored to the state in which it was when the plaintiff assigned his errors (*a*).

Amendment
of Transcript.

As to the amendment of an assignment of errors, see 2 Mod. 304; Fitzg. 268.

Of Assign-
ment of
Errors.

Execution.] Writs of execution may be amended for a misprision of the clerks, by the 8 H. 6, c. 12; and the court have accordingly allowed them to be amended in the *teste* (*b*), in the return (*c*), the names of the parties (*d*), the sum recovered by the judgment (*e*), and the like (*f*), even after they have been executed (*g*), and after a rule *nisi* obtained to set it aside (*h*); and this even as against the bail (*h*), upon payment of costs. So, if a *fieri facias* or *ca. sa.* be directed to the sheriff of another county, instead of a *testatum*, the plaintiff, upon suing out such a *fi. fa.* or *ca. sa.* as would warrant the former one, if it had been a *testatum*, get-

Execution.
For what De-
fects, when
and how.

(*s*) *Rutter v. Redstone*, 2 Str. 837; *Tully v. Sparkes*, Id. 869; see *Snook v. Mattock*, 5 Ad. & El. 239.

(*t*) *Rafael v. Verelst*, 2 W. Bl. 1067.

(*u*) *Gardner v. Merrett*, 2 Str. 902; 2 Ld. Raym. 1587; Fitzg. 268, S. C.

(*x*) *Gardner v. Merrett*, Fitzg. 268.

(*y*) See *Usher v. Dansey*, 4 M. & Sel. 94.

(*z*) *Danbers v. Pender*, 1 Wils. 337; see *Rev v. Ponsonby*, Id. 303; *De Tastet v. Rucker*, 3 B. & B. 65; 6 Moore, 135, S. C.; *Richardson v. Mellish*, 3 Bing. 334; 11 Moore, 104, S. C.

(*a*) *Randole v. Bailey*, 1 M. & Sel. 232.

(*b*) *Engleheart v. Dunbar*, 1 Dowl. 202; *Campbell v. Cumming*, 2 Burr. 1188; see *Bradley v. Baillie*, 1 Scott, 78; 3 Dowl. 111, S. C.; post, 1135.

(*c*) *Thorpe v. Hook*, 501; *Hunt v. Kendrick*, 2 W. Bl. 836; *Atkinson v. Newton*, 2 B. & P. 336. But not, it seems, to enlarge it. (*Hildyard v. Baker*, 2 Dowl. 16; 1 C. & M. 611, S. C.) At all events not without the consent of the

plaintiff. (Id.)

(*d*) *Thorpe v. Hook*, 1 Dowl. 501; *Mackie v. Smith*, 4 Taunt. 322; *Newnham v. Lau*, 5 T. R. 577.

(*e*) *Laroche v. Wasbrough*, 2 T. R. 737; *Arnell v. Weatherby*, 3 Dowl. 464; 1 C., M. & R. 831, S. C.

(*f*) See *Shaw v. Maxwell*, 6 T. R. 450.

(*g*) *Thorpe v. Hook*, 1 Dowl. 501; *M'Cormack v. Melton*, 1 Ad. & Ell. 331; *Arnell v. Weatherby*, 3 Dowl. 464; 1 C., M. & R. 831, S. C. In *M'Cormack v. Melton*, the plaintiff, having recovered 35*l.*, arrested the defendant on a *ca. sa.* for 34*l.* The court refused to discharge the defendant out of custody, and allowed the process to be amended by inserting the true sum, it not being shewn that the variance was intentional, or that the defendant was damaged. And see *Mouys v. Leake*, 8 T. R. 416, n.

(*h*) *Arnell v. Weatherby*, 3 Dowl. 464; 1 C., M. & R. 831, S. C.

BOOK IV.
PART I.

ting it returned, and entering the writ, return, and the award of the *testatum* on the roll, may have leave to amend the former writ by inserting the *testatum* clause, &c., upon payment of costs (*i*). And if the *testatum* be issued without an original to warrant it, the party may amend the defect himself at any time, by subsequently suing out the writ, even after an application to set aside the *testatum* (*j*). The writ may be amended by the award of execution on the roll (*k*), (and for this purpose the entry of the award of it on the roll must be made, and the roll produced in court at the time the motion is made, see *Vol. I.* 420), or by the record of the judgment (*l*).

When not.

The court, however, refused to allow an amendment of a *fi. fa.* where the defendant had become bankrupt before sale of the goods taken in execution under the writ, because the amendment would prejudice the rights of third persons; namely, the assignees and the other creditors (*m*). And where the defendant died before the application, the Court of Common Pleas refused to amend a *fieri facias* by inserting the *testatum* clause (*n*). Where, by allowing the amendment of a *ca. sa.*, the bail would be fixed, the court would give the bail an opportunity of freeing themselves (*o*).

No Statute of
Jeofails as to.

It may, perhaps, be necessary to add, that the statutes of jeofails do not extend to writs of execution.

Sheriff's Re-
turn.

Sheriff's Return.] As to allowing an amendment of this, see *ante*, *Vol. I.* 413. The court have, under peculiar circumstances, ordered the return to be amended, without the consent of the sheriff (*p*).

Rules of
Court, Orders,
&c.

Rules of Court, Orders, &c.] If a rule or order of the court be drawn up wrong by mistake, the court, upon application, will frequently order it to be corrected (*q*). In one case, where the christian and surname were transposed by mistake in an order of reference, the court allowed the mistake to be amended (*r*). But the court, in a more recent case, refused to allow an amendment in a rule for setting aside an award (*s*). Where the defect in a rule is attributable to the officer of the court, it will be amended without costs (*t*). The court has no jurisdiction to amend an order of *Nisi Prius* until it has been made a rule of court (*u*). Also, the court are not bound by the literal terms of the rule granted, but may make the rule absolute in what amended form they please, so as substantially to effect the object for which the rule was granted (*x*).

Affidavits.

Affidavits.] It seems that an affidavit may be amended in

(i) *Cowperthwaite v. Owen*, 3 T. R. 657; *Meyer v. Ring*, 1 H. Bl. 541. and see *Allen v. Allen*, 1 W. Bl. 694; *Farncombe v. Kent*, 2 Dowl. 465; *ante*, 420.

(j) *Esdaile v. Davis*, 6 Dowl. 465.

(k) *Atkinson v. Newton*, 2 B. & P. 336.

(l) *Thorpe v. Hook*, 1 Dowl. 501; *Browne v. Hammond*, Barnes, 10.

(m) *Hunt v. Pasman*, 4 M. & Sel. 329.

(n) *Phillips v. Tanner*, 6 Bing. 237; 3 Moo. & P. 562, S. C.

(o) *Bradley v. Baillie*, 1 Scott, 78; 3

Dowl. 111, S. C.

(p) *Green v. Glassbrook*, 2 Bing. N. C. 143; see *Rowe v. Tapp*, 9 Price, 347.

(q) *Tidd*, 452; see *Lopez v. De Tastet*, 8 Taunt. 712; 7 Moore, 120, S. C.

(r) *Price v. James*, 2 Dowl. 435.

(s) *Sherry v. Oke*, 3 Dowl. 349.

(t) *Downing v. Jennings*, 5 Dowl. 373.

(u) *Crouch v. Tregoning*, 5 Dowl. 230.

(x) *Doe Stevens v. Lord*, 6 Dowl. 256; see *Higgins v. Nichols*, 7 Dowl. 551, per *Patteson*, J.

matter of form (*y*). And in a late case, where the names of the deponents were omitted in the *jurat*, through the inadvertence of the judge's clerk, the judge allowed an amendment (*z*). If there is a defect in intitling affidavits produced on shewing cause against a rule, the court will sometimes allow the rule to be enlarged, in order that the title may be amended (*a*). And in a recent case, the title of an affidavit on which a rule had been obtained was allowed to be amended on payment of costs, the opposite party having leave to file affidavits in reply (*b*). If the affidavit be re-sworn, it seems that it can only take effect from the date of the new *jurat* (*c*).

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SECT. 2.

(*y*) See *Austin v. Grange*, 1 H. & W. 670, where it was held to be no objection to an affidavit that the words "before me" in the *jurat* were struck out, and "by the court" inserted.

(*z*) *Ex p. Smith*, 2 Dowl. 607. As to amending in the Exch. see 1 Tyrw. Rep. 261.

(*a*) *Anderson v. Ell*, 3 Dowl. 73: see *Davies v. Skerlock*, 7 Dowl. 592.

(*b*) *Rex v. Warwickshire Justices*, 5 Dowl. 332: see *Davies v. Skerlock*, 7 Dowl. 592.

(*c*) See *Wood v. Stephens*, 3 Moore, 326, *per curiam*.

CHAPTER XXXI.

COSTS.

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BOOK IV.
PART I.Costs not al-
lowed at Com-
mon Law.1. *Statutes and Rules as to.*

AT common law, neither the plaintiff nor the defendant was entitled to costs. In all actions, however, in which damages were recoverable, the plaintiff, if he had a verdict, was in effect allowed his costs; for the jury always computed them in the damages. But the defendant was wholly without remedy for any expenses he had been put to, if he had a verdict, or the plaintiff were nonsuited, the amercement to which the plaintiff was subjected in such a case, *pro falso clamore suo*, going entirely to the crown.

Now allowed
by Statute.

This, however, has since been remedied by statute. By stat. Gloucester, (6 *Ed.* 1, c. 1), the *plaintiff*, in all actions in which he recovers damages, shall also recover against the defendant his costs of suit (*a*); which statute extends to all cases in which single damages have been given by a subsequent statute (*b*), and also to cases where an action is given to a party grieved (*c*), but not to actions by a common informer (*d*). The circumstance that the plaintiff's cause has been conducted by one who is not an attorney, does not, in general, deprive the plaintiff of his right to full costs against the defendants (*e*). As to *defendants*, they are also now by stat. 23 *H.* 8, and 4 *Jac.* 1, entitled to costs if they have a verdict, or if the plaintiff be nonsuited after appearance, in all actions in which the plaintiff would be entitled to costs if he recovered (*f*).

(a) See *Garland v. Jekyll*, 2 Bing. 330; 9 Moore, 620, S. C.

(b) *Jackson v. Colesworth*, 1 T. R. 73.

(c) *Creswell v. Hoghton*, 7 T. R. 268; *Mayor &c. of Plymouth v. Werring*, Willes, 440; *Shore v. Madisten*, 1 Salk. 206; *College of Physicians v. Harrison*, 9 B. & C. 524; 2 Bac. Abr., Costs, E 3; *Ward v. Snell*, 1 H. Bl. 10.

(d) *Shore v. Madisten*, 1 Salk. 206; and see *Wilkinson v. Allot*, Cowp. 366; Bull.

N. P. 194; *Ward v. Snell*, 1 H. Bl. 10.

(e) *Reader v. Bloom*, 3 Bing. 9; 10 Moore, 261, S. C.; *Anon. v. Sexton*, 1 Dowl. 180; *Bayley v. Thompson*, 2 Dowl. 665; *Hill v. Mills*, Id. 696; *sed vide Young v. Dowlman*, 3 Y. & J. 24; *ante*, Vol. I. 35; and see *Patterson v. Powell*, 3 Moo. & Sc. 195; *Meekin v. Whalley*, 4 Id. 494; *Humphrys v. Harvey*, Id. 500.

(f) 4 J. 1, c. 3; 23 H. 8, c. 15.

But the statute of Gloucester, giving costs to the plaintiff in all cases where he recovered damages, as above mentioned, was found to have the effect of encouraging suits for very trifling causes; and the legislature, therefore, were obliged to interfere, and have in some measure remedied the evil, by enacting that if the plaintiff, in certain cases, recover less than 40s. damages, he shall be entitled to no more costs than damages. The statutes making this provision shall be mentioned particularly in the course of the present Chapter.

CHAP. XXXI.

Not allowed to Plaintiff in certain Cases.

Having made these few observations upon the subject of costs generally, and observing that the costs of particular actions, and in particular proceedings, have for the sake of convenience been treated of under the respective titles throughout this Work, we shall now consider the following branches of the subject which have not elsewhere been particularly noticed: *viz.*—

On Verdict for Plaintiff.] The general rule, established by the statute of Gloucester, as above mentioned, is, *that the plaintiff is entitled to his costs in all cases where he recovers damages.* The operation of this rule is, however, in many cases modified by subsequent statutes; and, first—

After Verdict for Plaintiff.
In General.

By 43 *El. c. 6, s. 2*, if in a *personal action* “not being for any *title or interest of lands*(*g*), nor concerning the *freehold or inheritance of any lands*, nor for any *battery*,” it shall be certified by the judge, (not the sheriff or judge of an inferior court trying under the 3 & 4 *W. 4, c. 42, s. 17*(*h*), nor on a writ of inquiry(*i*), before whom it shall be tried(*k*)), that the debt or damages to be recovered therein do not amount to 40s., the plaintiff shall have no more costs than damages, but less at the discretion of the court(*l*). The object of the statute was to confine trifling suits to inferior courts, or, in other terms, to prevent the bringing of actions which, in point of principle, ought not to be commenced at all(*m*). It has been holden to apply to all personal actions not expressly excepted from it(*n*). Even in actions upon statutes giving the plaintiff “full costs of suit,” the judge may certify under this statute, which will have the effect of giving the plaintiff no more costs than damages(*o*). In an action against an attorney, where there is a verdict for less than 40s. damages, the judge may certify under this statute, although the defendant could only be sued in the superior court(*p*). And he may certify, though one of the defendants suffer judgment by default(*q*). And although the

Where Judge certifies under 43 *El. c. 6, s. 2*, that Debt or Damages under 40s.

(*g*) A right to take water from a well, by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land. (*Tyler v. Bennett*, 5 *Ad. & El.* 377).

(*h*) *Claridge v. Smith*, 4 *Dowl.* 583; 1 *H. & W.* 667, *S. C.*

(*i*) *Wardroper v. Richardson*, 1 *Ad. & Ell.* 75; *Story v. Hodson*, 5 *Dowl.* 558; *Jones v. Bond*, 2 *M. & W.* 813; 5 *Dowl.* 455, *S. C.*

(*k*) Therefore, on a trial before the sheriff, where a verdict is given for less than 40s., the court has no power under the act to deprive the plaintiff of his costs. (*Story v. Hodson*, 5 *Dowl.* 558).

(*l*) See *Hullock*, 19, 27; *Walker v. Ro-*

binson, 2 *Str.* 1232; 1 *Wils.* 93, *S. C.*: *Howard v. Cheshire*, *Say.* 260; *Dand v. Sexton*, 3 *T. R.* 37.

(*m*) *Per Burrough*, *J.*, in *Pyeburn v. Gibson*, 8 *Moore*, 450; *Gilb. C. P.* 261.

(*n*) See *Dand v. Sexton*, 3 *T. R.* 37; *Pyeburn v. Gibson*, 8 *Moore*, 450, and the cases *infra*.

(*o*) *Irwine v. Reddish*, 5 *B. & Ald.* 796; 1 *D. & R.* 413, *S. C.*; see *Simpson v. Hurd*, 2 *M. & W.* 85; 5 *Dowl.* 304, *S. C.*

(*p*) *Wright v. Nuttall*, 10 *B. & C.* 492; 5 *M. & R.* 454, *S. C.*; and see *Pyeburn v. Gibson*, 8 *Moore*, 450.

(*q*) *Harris v. Duncan*, 4 *Nev. & M.* 63; 2 *Ad. & E.* 158, *S. C.*

defendant has pleaded several pleas, embodying the same defence, contrary to *R. H. T.*, 4 *W.* 4, s. 7 (which would otherwise entitle the plaintiff to his costs(*r*). And a plea of justification does not, it seems, necessarily prevent the judge from certifying(*s*). The form of the declaration may shew that the case is within the statute, but does not conclusively shew that it is not; and in order to determine whether or not the case is within the statute, the pleadings, and if they be not conclusive, then the evidence must be considered: therefore, if the action be for assault, battery, and false imprisonment, yet if no battery be admitted or proved, the judge may certify(*t*); and even where a battery is proved, the judge may certify as to the assault and false imprisonment, and then by the 22 & 23 *C.* 2, (see post, 1142), the plaintiff will be deprived of his costs upon the battery also(*u*). And the same has been held in an action for an injury to a right of common by digging turves, the title, &c., not coming into question(*x*). And where to an action of trespass *quare clausum fregit*, "not guilty" was pleaded since the rule *H.*, 4 *W.* 4, r. 5, s. 2, and the title, &c., did not come in question, it was held that the judge might certify(*y*). But if from the pleadings it appear that the title or interest in the lands, or the freehold or inheritance therein, necessarily came in question, or if a battery be admitted, the judge cannot certify; or if he do certify, the court, upon application, will direct the master to tax the plaintiff his costs, notwithstanding the certificate(*z*). Thus, where to trespass for breaking and entering a house, the defendant pleaded, 1st, not guilty; 2nd, that the messuage was not the plaintiff's; 3rdly, *Liberum tenementum*, and the plaintiff replied a demise from defendant, on which issue was joined, the plaintiff was held to be entitled to his full costs, notwithstanding a certificate under 43 *Eliz.*(*a*). And where to trespass *quare clausum fregit*, with a count *de bonis asportatis*, the defendant pleaded the general issue and accord and satisfaction, the question at the trial being, whether a term for years had expired, and the jury found a general verdict for the plaintiff, with damages under 40s., and the judge certified the amount of the damages under the statute 43 *Eliz.* c. 6, the Court of Exchequer held, that the plaintiff was entitled to costs *de incremento*, notwithstanding the certificate(*b*). So, where to trespass for breaking and entering plaintiff's stable and taking a horse, defendant pleaded "not guilty," and that the stable was not the plaintiff's, and leave and license; a verdict having been found for the plaintiff, with one farthing damages, the judge certified under the *stat.* 43 *Eliz.*: it was held, that the plaintiff was entitled to full costs, notwithstanding the judge's certificate(*c*). And the same in a late case, where to trespass for assault and false imprisonment the defendant

(*r*) *Simpson v. Hurdiss*, 2 *M. & W.* 84; 6 *Dowl.* 593.
5 *Dowl.* 304, *S. C.*

(*s*) *Walker v. Robinson*, 1 *Wils.* 93.

(*t*) *Emmet v. Lyne*, 1 *N. R.* 255: *Wilson v. Lainson*, 3 *Bing. N. C.* 307; 5 *Dowl.* 339, *S. C.*

(*u*) *Wiffin v. Kincard*, 2 *N. & R.* 471: *Briggs v. Bougin*, 2 *Bing.* 333; 9 *Moore*, 628, *S. C.*

(*x*) *Edmonson v. Edmonson*, 8 *East*, 296.

(*y*) *Smith v. Edwards*, 1 *Har. & W.* 497; 4 *Dowl.* 621: see *Mills v. Stephens*,

(*z*) *Littlewood v. Wilkinson*, 9 *Price*, 314: *Bone v. Dawe*, 3 *Ad. & El.* 711; 1 *H. & W.* 311; 5 *Nev. & M.* 230, *S. C.*: *Thomas v. Davies*, 3 *Nev. & P.* 567: *Dunnage v. Kemble*, 3 *Bing. N. C.* 538; 4 *Scott*, 365, *S. C.*: *Rawlings v. Tilt*, 3 *M. & W.* 28.

(*a*) *Thomas v. Davies*, 3 *Nev. & P.* 567; 8 *Ad. & E.* 598, *S. C.*

(*b*) *Wright v. Pigginn*, 2 *Y. & J.* 454.

(*c*) *Purnell v. Young*, 6 *Dowl.* 347: *Pugh v. Roberts*, 6 *Dowl.* 561.

pleaded a justification under a writ of *capias* (*d*). And the same in an action for an assault and battery, where the battery was justified (*e*). Where, however, to an action for an assault and battery of plaintiff's wife, the defendant pleaded that she was not the wife of the plaintiff, it was held that this did not necessarily admit the battery, and consequently, did not preclude the judge from certifying (*f*).

When the Certificate may be granted.

The certificate may be granted at or within a reasonable time after the trial, and before judgment (*g*); it has been granted even after taxation (*g*). It is, in general, final, if the judge have power to certify, and the court will not interfere with its operation, except, as we have already seen, in cases not within the statute, and in which the judge had no power to certify (*h*). But it seems that the judge who has granted the certificate may, within a reasonable time, (at all events, not exceeding the first four days of the next term (*i*)), review and annul it; and in one case, *Patteson, J.*, certified under the statute; but, in the ensuing term, new facts, which did not appear at the trial, being laid before him on affidavits, he granted an order to annul the certificate (*k*). In a later case, however, the Court of Common Pleas held, that, even assuming that the judge had power to revoke his certificate within a reasonable time, it was too late to revoke it fourteen months after the trial (*l*).

In *assumpsit* and *covenant*, therefore, the plaintiff, if he have a verdict, is, in all cases, entitled to costs, unless the damages be under 40s.; and, even in that case, unless the judge certify under 43 *Eliz. c. 6*, as above mentioned.

Effect of 43 Eliz. c. 6, s. 2, in Assumpsit.

And the same in *debt* on simple contract, and in *debt* on specialty, unless the debt and damages be under 40s., and the judge certify. But, in *debt* on a penal statute by a common informer, the plaintiff is not entitled to costs in any case, unless expressly given by the statute creating the penalty (*m*). And by stat. 43 *G. 3, c. 46, s. 4*, in *debt* on judgment, the plaintiff shall not be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the same court, shall otherwise order; which statute, however, extends only to actions brought upon judgments obtained by plaintiffs, and not to such as are brought upon judgments of nonsuit, or the like (*n*). And in an action on a judgment, the court refused to stay proceedings on payment of the debt without costs, where there was probable ground for the plaintiff's claiming also interest on part of the debt (*o*). The court would allow the plaintiff his costs if defendant pleaded a sham plea, as *nul tiel* record, &c. (*p*). But where a defendant had

In Debt.

(*d*) *Rawlins v. Tyl*, 3 M. & W. 28; 6 Dowl. 159, S. C.

(*e*) *Bone v. Dawe*, 5 Nev. & M. 230; 1 H. & W. 311; 3 Ad. & El. 711, S. C.

(*f*) *Wilson v. Lainson*, 3 Bing. N. C. 307; 3 Scott, 676; 5 Dowl. 339, S. C.

(*g*) *Holland v. Gore*, 3 T. R. 38, n.; Say. Costs, 18; *Fozall v. Banks*, 5 B. & Ald. 536; *Whalley v. Wilkenson*, 5 Bing. N. C. 200; which see as to reasonable time.

(*h*) *Twigg v. Potts*, 4 Dowl. 266; *Cann v. Facey*, 5 Nev. & M. 405; 4 Ad. & El. 68; 1 H. & W. 482, S. C.

(*i*) See *per Tindal, C. J.*, 5 Bing. N. C. 202.

(*k*) *Anderson v. Sherwin*, 7 C. & P. 527.

(*l*) *Whalley v. Williamson*, 5 Bing. N. C. 200.

(*m*) 2 Bac. Abr., Costs, E 3; Bul. N. P. 333; *Shore v. Madisten*, 1 Salk. 206; *Hullock*, 212; and see *Woodgate v. Knatchbull*, 2 T. R. 154; *Barnard v. Moss*, 1 H. Bl. 107; stat. 8 & 9 W. 3, c. 11.

(*n*) *Bennet v. Neale*, 14 East, 343.

(*o*) *Wood v. Silletto*, 1 Chit. Rep. 473.

(*p*) *Samuel v. Barker*, 5 Taunt. 264.

BOOK IV.
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been superseded through the neglect of the plaintiff, the court refused to allow the plaintiff the costs of an action on the judgment, although the defendant caused expense and delay by pleading a false plea (*q*). The application for an order to entitle the plaintiff to costs in an action on a judgment must be made to the court *in banc*, or a judge at chambers, and not at *Nisi Prius* (*r*).

In Trespass.

In *trespass*, also, the general rule is, that the plaintiff, if he have a verdict, shall have his costs of suit, however trifling the damages may be, unless where the judge certifies under the statute of Elizabeth, already mentioned. This rule must, however, be considered with reference to the following statutes; *viz.* 22 & 23 C. 2, c. 9; 8 & 9 W. 3, c. 11; and 4 & 5 W. & M. c. 2, s. 10.

Where the
Judge does
not certify
under 22 & 23
Car. 2, c. 9,
a Battery. or
that Title was
in question.

By 22 & 23 Car. 2, c. 9, in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land was chiefly in question (*s*), in case the jury find the damages to be under the value of 40*s*. the plaintiff shall not recover or obtain any more costs than the damages so found shall amount to. But this statute, as also the 21 J. 1, c. 16, only restrains the court from awarding more costs than damages; and the jury not being restrained thereby may give what costs they please (*t*). This statute extends only to actions for assault and battery, and to such personal actions as relate to the *freehold* or to things fixed to the freehold, that is, to cases where the freehold *may* come in question (*u*). It does not extend, therefore, to trespass to a personal chattel, as trespass *de bonis asportatis* (*x*); nor to trespass *de bonis asportatis*, with a count for a trespass to the freehold, if the plaintiff have a verdict on both counts (*y*), or on the *asportavit* count only (*z*); nor to trespass for breaking the plaintiff's close, and impounding his cattle (*a*); nor, it seems, to trespass for entering a freewarren and killing a hare (for the right of freewarren is only collateral to the land) (*b*); nor to trespass and assault upon, and criminal conversation with, the plaintiff's wife (*c*); nor to battery of the plaintiff's servant (*d*); nor to assault and false imprisonment, even where no battery is proved; for the action, in fact, is not for trespass or battery, but for depriving the plaintiff of his liberty (*e*). And if any count on a cause of action not within

(q) *Hall v. Pierce*, 5 Dowl. 603.

(r) *Jones v. Lake*, 8 C. & P. 395, per Parke, B.

(s) *Littlewood v. Wilkinson*, 9 Price, 314; see *Tyler v. Bennett*, 5 Ad. & Ell. 577; *ante*, 1139.

(t) *Watkinson v. Surger*, Cas. Prac. C. P. 45; Pr. Reg. C. P. 112, S. C.; *Browne v. Gibbons*, 1 Salk. 207.

(u) Bull. N. P. 329; *Ven v. Phillips*, 1 Salk. 208; 1 Saund. 5th ed. 300, n. It extends to trespass for mesne profits (*Doe v. Davies*, 6 T. R. 593); and to trespass for throwing stones at and breaking the windows of plaintiff's house. (*Adlam v. Grimacey*, 6 T. R. 281).

(x) *Ven v. Phillips*, 1 Salk. 208; *Smith v. Clarke*, 2 Str. 1130; see *Richardson v.*

Tomlin, 1 Esp. 255; *Anon.*, 1 Str. 634, 633; *Anon.*, 2 Vent. 215; *Gosson v. Graham*, 1 Stark. 55.

(y) *Lately v. Fry*, Comyn's Rep. 19; *Reece v. Lee*, 7 Moore, 269.

(z) 10 Freeman. 394.

(a) *Barnes v. Edgard*, 3 Mod. 39; see *Ven v. Phillips*, 1 Salk. 208; *Keen v. Whistler*, 1 Str. 534; *Thompson v. Berry*, Id. 551; and see *Anderson v. Buckton*, Id. 192.

(b) *Dacre v. Tebb*, 2 W. Bl. 1151.

(c) *Bachelor v. Bigg*, 3 Wils. 319; 2 W. Bl. 854, S. C.

(d) *Peake v. Anon.*, 3 Keb. 184; *Ven v. Phillips*, 1 Salk. 208; *Anderson v. Buckton*, 1 Stra. 192.

(e) *Booth v. Drake*, 6 Dowl. 564; see

the statute be joined with one which is, and the plaintiff obtain a verdict on both counts, the case is not within the statute, and a certificate is unnecessary (*f*). But where matter not within the act is laid in the declaration merely as matter of aggravation, or as a *consequential* damage, (arising to personal property, &c.), and not as a substantial and distinct cause of action, there the statute applies (*g*). Therefore, in trespass for assaulting and beating, and turning plaintiff out of a room, *whereby* he was prevented exercising his business of an attorney there, and defendant plead the general issue, and plaintiff have a verdict for less than 40s., he will have no more costs than damages, unless the judge certify (*h*). So, in an action for assault and battery, and tearing the plaintiff's clothes, if the plaintiff have a verdict for less than 40s., he shall have no more costs than damages, unless the judge certify: because the tearing of the clothes is a mere consequence of the battery, and not a substantial cause of action (*i*). And the same in an action for assaulting the plaintiff, and striking the horse on which he was riding, charged in the same count, the gist of the action being the assault and battery of the rider (*j*). When it appears from the pleadings that the freehold *cannot come in question*, the statute does not apply: and it may be here observed, that notwithstanding by the new rules of *H. T.*, 4 *W.* 4, the plea of "not guilty" only puts in issue the fact of breaking and entering, yet as those rules reserve to the defendant the right of pleading "not guilty" where it is given him by statute, and as there may, therefore, be cases in which, under that plea, the freehold *may* come in question, it has been held, that if a plaintiff in an action of trespass *quare clausum fregit* recovers a verdict for less than 40s., and defendant has pleaded only "not guilty," the plaintiff will not be entitled to his costs without a certificate (*k*); but, since the rule of *T. T.* 1838, which directs, that a defendant intending to give special matter in evidence under the general issue, by virtue of a statute, shall insert in the margin of the plea the words "by statute;" it may be questioned whether, where the defendant pleads the general issue only without those words, the plaintiff would not be entitled to his costs without a certificate (*l*). Even in cases clearly within the statute, if the defendant *plead a justification* of the battery, the plaintiff shall have full costs without a certificate, although the verdict be for less than 40s. (*m*), provided the

Carter v. Fish, 1 Str. 645: *Wiffin v. Kincaid*, 2 N. R. 471.

(*f*) *Lately v. Fry*, Comyn, 19: *Reeve v. Lee*, 7 Moore, 269.

(*g*) *Daubney v. Cooper*, 10 B. & C. 830; and cases cited *infra*.

(*h*) *Daubney v. Cooper*, 10 B. & C. 830: and see *Bannister v. Fisher*, 1 Taunt. 357: *Clegg v. Molynaux*, Doug. 779.

(*i*) *Cotterill v. Tolly*, 1 T. R. 665: *Lockwood v. Stannard*, 5 T. R. 492: *Mears v. Greenaway*, 1 H. Bl. 291. See action for assaulting and throwing water on plaintiff, and damaging his clothes, &c. (*Pursell v. Horne*, 3 Nev. & P. 564).

(*j*) *Bannister v. Fisher*, 1 Taunt. 357.

(*k*) *Dunnage v. Kemble*, 3 Bing. N. C. 538; 4 Scott, 365; 5 Dowl. 478; S. C.:

Patrick v. Colerick, 4 M. & W. 527; 7 Dowl. 201, S. C.: overruling *Hughes v. Hughes*, 2 C., M. & R. 663: *Smith v. Edwards*, 4 Dowl. 621: see R. T. T. 1838.

(*l*) See the rule, and the notes in 4 M. & W. 528; 7 Dowl. 202.

(*m*) *Smith v. Edge*, 6 T. R. 562: *Martin v. Vallance*, 1 East, 350: *Redridge v. Palmer*, 2 H. Bl. 2, 342: *Taylor v. Nicholls*, 3 B. & Ald. 443: *Johnson v. Northwood*, 7 Taunt. 689; 1 Moore, 420, S. C.: *Peddle v. Kiddle*, 7 T. R. 659: *Bone v. Dawe*, 1 Harr. & W. 311; 3 Ad. & El. 711; 5 Nev. & M. 230, S. C.: and see *Rawlings v. Till*, 5 Dowl. 159; 3 M. & W. 28, S. C.: and *Booth v. Drake*, 6 Dowl. 564.

justification extends to the battery (*n*). And it has been held, that if the defendant plead a disclaimer of title, that the trespasses were voluntary, and a tender of amends, or a license, and it is found against him, the plaintiff is entitled to full costs, though he do not recover 40s. damages (*o*). So, a certificate is unnecessary in an action of trespass *quare clausum fregit*, wherever the defendant pleads a special plea which is found against him, whatever be the nature of that plea; for the plea must shew, either that the freehold cannot come in question, in which case the statute does not apply; or that it does, in which case a certificate is unnecessary, for it would be idle to require a certificate of that which appears already by the record (*p*). So, if the special plea be not traversed, or if it be traversed, and found for the defendant, yet if the plaintiff new assign, and defendant plead "not guilty" to the new assignment, and it be found against him, no certificate is necessary (*q*); for though the right, as claimed by the plea, be determined in favour of the defendant, yet the applicability of that right to the trespass complained of is put in issue by the new assignment and plea thereto; and, therefore, it appears by the whole record whether the freehold come in question or not; unless, indeed, it be quite manifest, from the nature of the plea and new assignment, that the matter covered by the plea is no longer at all in question; as, where the plea set out the right of way by metes and bounds, and the plaintiff new assigned *extra viam*, so that the extent of the way was admitted (*r*). In cases of this kind, therefore, if defendant is not certain of succeeding on the new assignment, he should suffer a judgment by default thereto; and if he has pleaded "not guilty" to the declaration, he should take care also to withdraw such plea so far as the same can relate to the trespass newly assigned; for, if he did not adopt the latter course, and a verdict were found for the plaintiff on the general issue, the plaintiff would be entitled to the *postea* and the general costs of the trial, notwithstanding defendant succeeded on his special pleas (*s*). And where, to an action of trespass *quare clausum fregit*, the defendant pleaded "not guilty," and justifications under a right of way, issue was joined on the plea of "not guilty," the right of way was traversed and issue joined thereon, and the plaintiff new assigned, and defendant suffered judgment by default thereon; a verdict was found for plaintiff, on the issue of "not guilty," with 1s. damages, and 40s. damages on the new assignment; and a verdict was found for defendant on one of the justifications; it was held, that the plaintiff was entitled to the general costs in the cause (*t*). Had defendant withdrawn his plea of "not guilty" to the trespass newly assigned, then the defendant would have obtained the general costs of the cause, and the plaintiff only the costs

(*n*) *Pursell v. Horne*, 3 Nev. & P. 564; 8 Ad. & E. 602, S. C.

(*o*) *Wright v. Pigginn*, 2 Y. & J. 547: see *Pugh v. Roberts*, 3 M. & W. 458.

(*p*) *Id.* 540; 1 Saund. 300, n., and cases in note, (*m.*) *ante*, 1143.

(*q*) *Asser v. Finch*, 2 Lev. 234: *Taylor v. Nicholls*, 3 B. & Ald. 443; 1 Saund. 300, n., 5th ed.

(*r*) *Cockerill v. Allanson*, Hullock on

Costs, 76; 1 Saund. 300, n., 5th ed.: see *Martin v. Vallance*, 1 East, 350.

(*s*) See 1 Saund. 300, n. (*a*).

(*t*) *Vickers v. Gallimore*, 5 Bing. 196; 2 Moo. & P. 359, S. C.: and see *House v. Thames Commissioners*, 3 B. & B. 117: *Langden v. Bourne*, 1 B. & C. 278: *Broadbent v. Shaw*, 2 B. & Adol. 940: *Martin v. Vallance*, 1 East, 350.

of the inquiry(*u*). It was formerly holden, that if a view were granted in the cause, it had the same effect as a plea of justification(*x*); but it has since been determined otherwise, for the mere circumstance of a view does not necessarily shew that the title is in question(*y*). But although a particular case be not within the statute, (as, for instance, an action for assault and battery together with a false imprisonment, without a plea of justification(*z*)), yet if it be within the stat. 43 *El. c.* 6, mentioned *ante*, 1139, the plaintiff may be deprived of costs, by the judge granting a certificate under that statute(*a*). It may be necessary to add, that the statute of Charles does not extend to inquisitions upon writs of inquiry in any case; therefore, if judgment go by default, the plaintiff will be entitled to his costs, though the damages be assessed at less than 40s.(*b*). The certificate under that act may be granted out of court at any time between verdict and final judgment, or, at all events, within a reasonable time after the assizes(*c*).

For the preventing of wilful and malicious *trespasses*, it is enacted by stat. 8 & 9 *W. 3, c.* 11, s. 4, "that in all actions of *trespass*, to be commenced or prosecuted in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand upon the back of the record, that the trespass upon which any defendant shall be found guilty, was *wilful and malicious*, the plaintiff shall recover not only his damages, but also his full costs of suit, any former law to the contrary notwithstanding"(*d*). Where the trespass has been committed after notice(*e*), the judge usually certifies under this act(*f*); but it is perfectly discretionary with him to do so or not(*g*); and he will not certify if it appear that the trespass was committed for the purpose of asserting a disputed right(*g*). The certificate, in this case also, may be granted out of court at any time between verdict and final judgment(*h*).

Where the Judge certifies under 8 & 9 *W. 3, c.* 11, s. 4, that the Trespass was wilful and malicious.

By the 4 & 5 *W. & M. c.* 23, s. 10, if any inferior tradesman, apprentice, or other dissolute person, shall presume to hawk, hunt, fish, or fowl, and shall be found guilty of *trespass* in coming upon other men's land for that purpose, the plaintiff in such action shall recover his full costs of suit, although the damages be under 40s.(*i*). But that act is now repealed by the 1 & 2 *W. 4, c.* 32 (the Game Act).

4 & 5 *W. & M. c.* 23, s. 10, repealed by 1 & 2 *W. 4, c.* 32.

In actions on the case for torts, the plaintiff is, in general, entitled to his full costs of suit in all cases, however trifling the damages may be, unless the judge certify under the above

In Actions on the Case.

(*u*) *Cross v. Johnson*, 9 B. & C. 613; *Forester v. Dale*, 1 Dowl. 412.

(*x*) *Kempster v. Deacon*, 2 Salk. 665; 1 Ld. Raym. 76, S. C.

(*y*) *Flint v. Hill*, 11 East, 184.

(*z*) *Wiffin v. Kincard*, 2 New Rep. 471.

(*a*) *Briggs v. Bowgin*, 2 Bing. 333; *Bone v. Dawe*, 1 Harr. & W. 311; 3 Ad. & El. 711; 5 Nev. & M. 230, S. C.; *ante*, 1144 (*n*); *Rawlings v. Till*, 3 M. & W. 28; 5 Dowl. 159, S. C.; *Purnell v. Young*, 6 Dowl. 347.

(*b*) Bull. N. P. 329.

(*c*) *Johnson v. Stanton*, 4 D. & R. 156;

2 B. & C. 621, S. C.; see *Whalley v. Williams*, 5 Bing. N. C. 200, per *Bosanquet, J.*

(*d*) See *Batchelor v. Bigg*, 3 Wils. 325.

(*e*) See *Hullock*, 94 to 99.

(*f*) See *Regnard v. Edwards*, 6 T. R. 11.

(*g*) *Good v. Watkins*, 3 East, 495.

(*h*) *Woolley v. Whitby*, 2 B. & C. 580; 4 D. & R. 147, S. C.; *Gundry v. Sturt*, 1 T. R. 636; *Swinerton v. Jarvis*, 6 T. R. 12.

(*i*) See *Burton v. Mingay*, 2 Wils. 70; *Pallant v. Roll*, 2 W. Bl. 900; *Wickham v. Walker*, Barnes. 125; *Hullock*, 84 to 93; *Deacon*, G. L. 190.

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PART I.

Slander.

stat. 43 *El. c. 6*(*n*); except in actions for “*slanderous words*,” in which, by 21 *J. 1, c. 16*, if the damages found be under 40*s.*, the plaintiff shall recover no more costs than damages; and the judge cannot certify to give the plaintiff his full costs(*o*). This statute of James, however, extends only to such words as are actionable of themselves(*p*). It does not, therefore, extend to actions for slander of title(*q*), or to other actions where the special damage is the very gist of the action(*r*). But it extends to words actionable only in respect of their being spoken of the plaintiff in his trade, or the like(*s*), even though the defendant pleads a justification(*t*). It applies to writs of inquiry as well as a trial where the damage is under 40*s.*(*u*). The statute, however, only restrains the court from awarding more costs than damages; but the jury not being restrained thereby, may give what costs they please(*v*). Also, where the defendant succeeds on the general issue, this statute does not deprive the plaintiff of the costs of a plea of justification which has been found for him(*x*).

Infringement
of Patent.

In an action for an *infringement of a patent*, the 5 & 6 *W. 4, c. 83, s. 3*, enacts, “that if any action at law or any suit in equity for an account shall be brought in respect of any alleged infringement of such letters patent heretofore or hereafter granted, or any *scire facias* to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them upon the merits of the suit, it shall be lawful for the judge before whom such action shall be tried to certify on the record, or the judge who shall make such decree or order to give a certificate under his hand, that the validity of the patent came in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs.” And the sixth section of the same act enacts, “that in any action brought for infringing the right granted by any letters patent, in taxing the costs thereof, regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had, and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the notice of objections, as well as the counts in the declaration, and without regard to the general result of the trial.” Notwithstanding this last section, where the substance of six objections out of seven had been found for

(*n*) See *Edmonson v. Edmonson*, 8 East, 294; *Williams v. Miller*, 1 Taunt. 400.

(*o*) *Goodall v. Ensell*, 3 Dowl. 743.

(*p*) *Collier v. Gaillard*, 2 W. Bl. 1062; *Surman v. Shielto*, 3 Burr. 1668; *Saville v. Jardine*, 2 H. Bl. 531; *Turner v. Horton*, Willes, 438; *Hullock*, 27, 34; *Tidd*, 9th ed. 962.

(*q*) *Laue v. Harwood*, Cro. Car. 141.

(*r*) *Brown v. Gibbons*, 2 Ld. Raym.

831; *Barry v. Perry*, Id. 1588; 2 Stra. 906; *S. C. v. Carter v. Fish*, 1 Id. 645; *Kelly v. Partington*, 5 R. & Adol. 645.

(*s*) *Grenfell v. Pierson*, 1 Dowl. 406.

(*t*) *Halford v. Smith*, 4 East, 567.

(*u*) *Lampen v. Hatch*, 2 Stra. 934.

(*v*) *Brown v. Gibbons*, 1 Salk. 207.

(*x*) *Skinner v. Shoppy*, C. P., M. 1839, 3 Jurist, 1127.

the plaintiff, but the defendant obtained a verdict on one issue which covered the entire cause of action, it was held that the plaintiff was entitled to six-sevenths of the costs of copying, transcribing, &c., those objections, and the costs of the issues found for him, but that the defendant was entitled to the costs of the issues found for him, and the general costs of the cause(y).

In actions on statutes by parties aggrieved, the plaintiff, if he have a verdict, is entitled to costs, as in other cases, though the statute on which the action is founded be subsequent to the statute of Gloucester(z). But, in actions by an informer, the plaintiff is not entitled to costs unless expressly given to him by statute(z).

In Actions on Statutes.

Before the 8 & 9 W. 3, c. 11, in an action on the statute of 2 & 3 Ed. 6, for not setting out tithes, the plaintiff was not in any case entitled to costs of suit(a). But sect. 3 of that act enacts, "that in all actions of debt for not setting forth of tithes, wherein the single value found by the jury shall not exceed the sum of twenty nobles, (*i. e.* 6*l.* 13*s.* 4*d.*), the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit." The enactment is, it seems, confined to cases where the plaintiff obtains judgment after a plea or demurrer, and does not apply to a case where a defendant suffers judgment by default(b). And where a declaration contained three counts,—first, for the treble value of the tithes of corn, grain, hay, hops, and beans, not set out by the defendant; secondly, for tithes bargained and sold; and lastly, on an account stated; and the defendant having suffered judgment by default, the jury, on a writ of inquiry, assessed the plaintiff's damages at 17*l.* 4*s.* 9*d.* for the treble value, and the sum of 9*l.* for the single value of the other tithes, but found no costs,—the court were of opinion that the statute did not apply to a judgment by default, but they ordered the return of the inquisition to be amended by the insertion of nominal damages as to the last two counts of the declaration, on which it was held, that costs *de incremento* might be taxed as being applicable to the last two counts, without reference to the first count(c). So, where an action of debt under the statute was brought to recover the treble value of the tithes, there was also a count in the declaration for the single value: the defendant demurred to the declaration, but the parties afterwards agreed to submit to arbitration, and judgment was entered to stand as a security for costs: the arbitrators determined the single value of the tithes, and awarded treble that sum to the plaintiff, together with the costs of the reference, and that he might sue out execution: upon an application to the court to allow the plaintiff's costs of suit to be taxed under the statute of 8 & 9 W. 3, the court held, that the statute was confined to the case of the single value, or damages being found by a jury, and therefore re-

On 2 & 3 Ed. 6, for not setting out Tithes.

(y) *Losche v. Hague*, 7 Dowl. 495.
(z) *Ward v. Swell*, 1 H. Bl. 10; *Shore v. Madisten*, 1 Salk. 206; *ante*, 1138.

(a) *Day v. Peckwell*, Moo. 915; 1 E. & Y. 154, S. C.; *Dagg v. Penkevon*, Cro. Ja. 70; 1 E. & Y. 162, S. C.

(b) See 2 Eagle on Tithes, 331: *Bar-nard v. Moss*, 1 H. Bla. 107; 2 E. & Y. 357, S. C.; *Bale v. Hodgetts*, 7 Moore, 602; 3 E. & Y. 1089, S. C.

(c) *Bale v. Hodgetts*, *supra*.

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PART I.

fused to grant a rule as far as it respected the counts for the penalty, but allowed the costs to be taxed on the count for the single value (*e*). By the common law, or by the statute of 23 Hen. 8, c. 15, a *defendant* in an action of debt upon the statute was not entitled to costs in any case. But by the 8 & 9 W. 3, c. 11, s. 3, "if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same in like manner as aforesaid."

In other Actions.

The right of the plaintiff to costs in *ejectment*, *replevin*, and *scire facias*, has been treated of under those heads respectively. (See *Index*).

In case of Arrest without probable Cause, 43 G. 3, c. 46, s. 3.

By the 43 Geo. 3, c. 46, s. 3, if the plaintiff *do not recover the amount of the sum for which he "arrested and held the defendant to special bail,"* the court, upon motion, shall direct that the defendant be allowed his costs, if it be made appear upon hearing the parties by affidavit, to the satisfaction of the court, that the plaintiff had not any "reasonable or probable cause" for holding the defendant to bail in such amount as aforesaid; and if the court make a rule or order to this effect, the plaintiff shall thereupon be disabled from suing out execution, excepting for the excess of the sum recovered by him, above the costs taxed for the defendant; or if the costs taxed for the defendant exceed the sum recovered by the plaintiff, the defendant may have execution for the excess (*f*). If, for instance, two persons be mutually indebted to each other, and one of them hold the other to bail for the whole amount of the debtor side of the account, instead of for the balance merely, the court, upon application, will allow the defendant his costs under this statute (*g*). So, where the plaintiff caused the defendant to be arrested for 1,123*l.* when he had means of knowing that only 715*l.* was due, the court allowed the defendant his costs, though the accounts were complete (*h*). And the same, where the defendant was arrested for 86*l.*, and the plaintiff recovered 15*l.* only, and it appeared that the cause of action was for unliquidated damages, for which the defendant ought not to have been arrested (*i*). And, where an attorney held his client to bail for 500*l.*, but his bill on a reference for taxation was taxed at 299*l.*, the court on an application under this statute referred it to the master to say, whether there was reasonable and probable cause for holding the defendant to bail for 500*l.*, and on the master's reporting in the negative, the court allowed the defendant his costs (*k*). So, where a defendant was holden to bail for the amount of board and lodging, charged at the rate of 2*l.* per week, and at the trial it was proved that the plaintiff had expressly agreed to charge at the rate of 1*l.* per week only,

(*e*) *Barnard v. Moss*, 1 H. Bla. 107; 2 E. & Y. 357; 2 Eagle, 331, S. C.

(*f*) See *Clarke v. Fisher*, 1 Smith, 428; *Younie v. Mallison*, 1d. 521; *Anon.*, 2 1d. 261, 267; *Thompson v. Atkinson*, 6 B. & C. 193; *Robinson v. Elsam*, 5 B. & Ald. 661. See the form, Chit. Forms, 644.

(*g*) *Drongfield v. Archer*, 5 B. & Ald. 513; 1 D. & R. 67, S. C.; and see *Austin v. Debnam*, 4 D. & R. 653; 3 B. & C. 139, S. C.; *Ashton v. Naull*, 2 Dowl. 727; 3

Moo. & Scott, 114, S. C. (in that case the defendant had refused to furnish plaintiff with an account of his set off); *Sims v. Jaquest*, 4 Moo. & Sc. 380; 2 Dowl. 800, S. C.

(*h*) *Foster v. Weston*, 6 Bing. 527.

(*i*) *Bear v. Binkus*, 4 Nev. & M. 846.

(*k*) *Robinson v. Elsam*, 5 B. & Ald. 661. See case of publican improperly supplying drink, *Erle v. Wynne*, 2 Dowl. 23.

and there was a verdict accordingly, the court upon application allowed the defendant his costs under this statute, although the plaintiff denied by his affidavit that he had made any such agreement as that proved at the trial (l). So, where on a motion for costs under the act, (the plaintiff having arrested defendant for 35*l.* and recovered only 19*l.*), affidavits were put in for the plaintiff, sworn by himself and others, contradicting the evidence given at the trial for the defendant, and impeaching the credit and competency of his principal witness; no motion had been made by the plaintiff for a new trial, or to increase the damages: it was held, that the verdict was *primâ facie* evidence of the want of cause for arresting; and that the court could not try, upon affidavit, whether or not such verdict was well founded (m). And where the plaintiff had sold goods to the defendant, to be paid for, half in ready money, and half by bill at three months; and the defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods; the court held he had no reasonable or probable cause for so doing, and that the defendant was entitled to his costs pursuant to the above statute (n). So, where a builder was employed in altering the defendant's house, and, during the progress of the work, the defendant countermanded the employment, and, on the refusal of the defendant to appoint a valuer, the builder completed the work, and arrested for the whole amount, but recovered only for the work done previously to the countermand, the court allowed the defendant his costs (o). So, where the defendant objected to receive the goods sold to him by the plaintiff because they were badly manufactured, and the plaintiff agreed to take them back, but after they were returned he sent them again to the defendant, and then arrested him for the amount, the plaintiff having recovered less than the sum for which he had arrested, the court held that the defendant was entitled to his costs (p). And where defendant was arrested for a sum in respect of the greater portion of which the plaintiff knew at the time that the defendant had obtained a discharge under the Insolvent Debtors' Act, the court gave the defendant his costs under the above statute (q). And where the defendant was arrested for 20*l.* 2*s.* 1*d.* for goods sold, and defendant pleaded his infancy, to which plaintiff replied, necessities: at the trial the plaintiff succeeded in proving the delivery of certain articles only in his bill of particulars, and got a verdict for 10*l.* only: on an affidavit of the defendant that he never owed the plaintiff 20*l.*, the court gave him his costs under the above act, notwithstanding the plaintiff swore that all the articles in the bill of particulars were delivered to the defendant (r). And a party is not warranted in arresting another for a debt of which he has not, *at the time of making*

CHAP. XXXI.
43 G. 3, c. 46,
s. 3.

(l) *Glenville v. Hutchins*, 1 B. & C. 91: and see *Linley v. Bates*, 2 C. & J. 660: *Anon.*, 2 Smith, 261.

(m) *Tipton v. Gardner*, 4 Ad. & Ell. 317: see *Twiss v. Osborn*, 4 Dowl. 107.

(n) *Day v. Picton*, 10 B. & C. 120; 5 M. & R. 31, S. C.: see *Gompertz v. Denton*, 1 Dowl. 623.

(o) *Russell v. Atkinson*, 2 Nev. & M. 667.

(p) *Linley v. Bates*, 2 Tyr. 753; 2 C. & J. 660, S. C.

(q) *Lord Huntingtower v. Heeley*, 7 D. & R. 369.

(r) *Ballantine v. Taylor*, 1 Nev. & P. 219; 5 Ad. & Ell. 792, S. C.

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s. 3.

the arrest, some evidence besides his own personal knowledge of its existence; and therefore a plaintiff arresting a defendant for a large sum of money, and having, at the time of arrest, evidence only as to a small portion of the amount, was held liable to costs under the act, although at the time of the trial some evidence of a subsequent acknowledgment by the defendant was given(s). It is not necessary, to bring a case within this act, to prove malice; the absence of reasonable or probable cause is sufficient(t). It applies even to executors(u); though, for obvious reasons, the court will require a strong case to be made out to induce them to allow the defendant his costs against an executor(x).

On the other hand, the court will not, in general, allow the defendant his costs under this act of 43 G. 3, c. 46, s. 3, unless the sum for which the defendant was held to bail was materially larger than that found to be due(y). Nor where the plaintiff is defeated by a defence not going to the merits, and which he had no means of knowing at the time, or which the defendant has induced him to believe that he will not set up. Thus, where the defendant being arrested for 500*l.*, set up her coverture as her defence, and plaintiff recovered only 38*l.* for money advanced after the death of her husband; upon an application by defendant for costs under the above act, the plaintiff having deposed that he was ignorant of the coverture, and not being contradicted, the court would not grant the application(z). And where the defendant, by his admissions of the debt and promises, deceived and deluded the plaintiff into a belief that he did not mean to set up the Statute of Limitations as a defence, but afterwards pleaded that statute, the court would not give him his costs(a). In an action by the indorsee against the maker of a promissory note for 100*l.*, the defendant pleaded, that, by agreement between him and the payee, the note was not to be enforced, except on certain terms, which the payee had not complied with, and that the plaintiff had received the note without consideration; the plaintiff entered a *nolle prosequi* as to all, except 49*l.*, for which he had given value to the payee, and had a verdict for that sum; it did not appear that the plaintiff was cognizant of the agreement, and the court refused to allow the defendant his costs(b). And it seems that the court will not allow the defendant his costs under the act, where the evidence is conflicting as to the amount due; thus, where the arrest was for 20*l.*, and, at the trial, the evidence of the witnesses for the plaintiff and for the defendant, as to the value of the goods, for the price of which the action was brought, was conflicting, and the jury struck a balance between their estimates, and found a verdict for 8*l.*, the plaintiff swearing that there was an agreement for the

(s) *Griffiths v. Pointon*, 2 Nev. & M. 675: see *White v. Prickett*, *infra*, n.: *Robinson v. Whitehead*, 6 Dowl. 292.

(t) *Donlan v. Brett*, 10 B. & C. 117; 4 M. & R. 29, S. C.: *Hall v. Forget*, 1 Dowl. 606; *Earle v. Wynne*, 1 C. & M. 532.

(u) *Feeley v. Reed*, 5 B. & A. 515, n.

(x) See *per Heath, J.*, in *Foulkes v. Neighbour*, 1 Marsh. 21.

(y) *Per Tindal, C. J.*: *Sherwood v.*

Taylor, 6 Bing. 281; 3 Moo. & P. 641, S. C.: see *Roper v. Shevely*, 2 Dowl. 14.

(z) *Spooner v. Dank*, 7 Bing. 772; 5 Moo. & P. 701; 1 Dowl. 232, S. C.: and see *Roper v. Sheasby*, 1 C. & M. 496.

(a) *White v. Prickett*, 4 Bing. N. C. 237.

(b) *Edwards v. Jones*, 2 M. & W. 414; 5 Dowl. 584, S. C.

higher rate, which he was unable to prove at the trial, the court refused to allow the defendant his costs (*c*). And the court will not give the defendant his costs where there is a reasonable doubt in law as to the plaintiff's right to recover part of his demand (*d*). Where the plaintiff omitted a count in the declaration, applicable to a part of his demand, and was thereby prevented from recovering the amount for which the defendant was arrested, the court refused the defendant his costs under the act (*e*). And the statute applies only to cases where the plaintiff "recovers" a less sum than that for which he arrested, by judgment (*f*); therefore, if, upon a compromise between the parties, the plaintiff take a less sum than that for which he arrested, the defendant will not be allowed his costs (*g*); and if a defendant, upon being arrested for a certain sum, pay a less sum into court, the plaintiff, by taking that sum out of court and discontinuing the action, will not thereby subject himself to costs under this statute (*f*). Or, if the matter be referred to arbitration, before verdict, and the arbitrator award the plaintiff a less sum than that for which he had holden the defendant to bail, the court will not, in such a case, allow the defendant his costs under this statute (*h*). So, where the defendant, who was arrested for 327*l.*, had tendered 250*l.*, but did not pay it into court, and an arbitrator, to whom the cause was referred, awarded the plaintiff only 250*l.*, the court held that this was not a case to entitle defendant to costs under the statute (*i*). But, if the arbitrator has power to order, and does order, a judgment to be entered up (*k*), or if the cause be referred at *Nisi Prius*, and a verdict be taken, subject to the award (*l*), (even if the cause and all matters in difference be referred, provided the arbitrator make a separate adjudication as to the action (*m*)), the court may allow the defendant his costs, unless, indeed, where the cause and all matters in difference are referred, and the costs are, by the terms of the reference, to abide the event of the award (*n*). Where an arbitrator, to whom a cause has been referred by order of *Nisi Prius*, takes no notice in his award of a power given him by the order to award the defendant his costs on the ground of an excessive arrest, but disposes of the general costs of the cause, the court will not interfere to

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43 G. 3, c. 46,
s. 3.

(*c*) *Shotwell v. Barlow*, 1 Gale, 107; 3 Dowl. 709, S. C.; and see *Clare v. Cooke*, 4 Bing. N. C. 269; *Mantill v. Southall*, 2 Bing. N. C. 74; *Day v. Clark*, 5 Bing. N. C. 117; 7 Dowl. 147, S. C.

(*d*) *Stovin v. Taylor*, 1 Dowl. 697; 1 Nev. & M. 250, S. C.; *James v. Francis*, 5 Price, 1.

(*e*) *Preedy v. M'Farlane*, 1 C., M. & R. 819; 3 Dowl. 458, S. C.

(*f*) *Brooks v. Rigby*, 2 Ad. & El. 21; *Roue v. Rhodes*, 2 Dowl. 384; 2 C. & M. 379, S. C.; *Porter v. Pittmann*, 2 D. & R. 266; *Davey v. Renton*, 4 D. & R. 187; 2 B. & C. 711, S. C.; *Roufeyroy v. Alefson*, 13 East, 90; *Butler v. Brown*, 1 B. & B. 66; 3 Moore, 327, S. C. But sometimes the court or a judge could make the plaintiff pay the defendant's costs. (See ante, 976, 987).

(*g*) *Linthwaite v. Bellings*, 2 Smith, 667.

(*h*) *Keene v. Deeble*, 5 D. & R. 383; 3 B. & C. 491, S. C.; *Payne v. Acton*, 1 B. & B. 278; 3 Moore, 605, S. C.

(*i*) *Sherwood v. Taylor*, 6 Bing. 280; 3 Moo. & P. 641, S. C.; *Holden v. Raith*, 4 Nev. & M. 466; 1 H. & W. 8.

(*k*) *Per Littleale, J.*, *Holden v. Raith*, 4 Nev. & M. 466.

(*l*) *Jones v. John*, 5 Dowl. 130; 2 H. & W. 119; see *Turner v. Prince*, 5 Bing. 191; and *Silversides v. Bowley*, 1 Moore, 92.

(*m*) *Jones v. John*, 5 Dowl. 130; 2 H. & W. 119, S. C.

(*n*) *Thompson v. Atkinson*, 6 B. & C. 193. See where the accounts were complicated, and the court refused costs under the statute, *Turner v. Prince*, 5 Bing. 191; 2 Moo. & P. 305, S. C.; and see *Handley v. Levi*, 8 B. & C. 637; 3 M. & R. 37, S. C.; *Thompson v. Atkinson*, 6 B. & C. 193; 9 D. & Ry. 347, S. C.

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give the defendant his costs (*o*). The onus of proving that the arrest was made without reasonable or probable cause rests on the defendant (*p*).

What a sufficient Arrest within the 43 G. 3, c. 46, s. 3.

The 43 G. 3, c. 46, s. 3, does not extend to cases where the defendant has not been actually arrested as well as held to special bail (*q*). It is, however, a sufficient arrest, if the officer meets the defendant, states that he has a warrant, goes with him to defendant's house, and a bail-bond is executed (*r*). And, it seems, that taking a bail-bond is a sufficient arrest, but not, perhaps, where the copy of the *capias* served is afterwards set aside for irregularity (*r*). It is questionable, whether a defendant who has been arrested and imprisoned, and discharged in consequence of a defect in the affidavit to hold to bail, can be said to have been arrested and held to special bail within the meaning of the act (*s*). The act does not extend to actions originally brought in an inferior court, (as the Palace Court, &c.), and removed into the courts at Westminster (*t*).

When Costs taken away by Court of Request Acts.

There are various acts of parliament establishing *Courts of Requests* for the recovery of small sums throughout the kingdom; some prohibiting parties from bringing actions in any other court, others depriving the plaintiff of his costs, and others making him pay defendant's costs if he sue in any other court. The general principles applicable to the construction of these statutes, and the practice as to entering suggestions under them, will be found *post*, 1173, 1176.

Welsh Judicature Act repealed.

The Welsh Judicature Act (*u*), which enacts that the plaintiff shall be nonsuited, and pay defendant his costs in certain actions brought in the superior courts out of the principality of Wales, for causes of action arising in the principality, &c., not amounting to 50*l.*, is virtually repealed by the 11 G. 4 & 1 W. 4, c. 70.

Where Cause made a Remanet, &c.

As to the costs incurred in bringing up witnesses, attendances, &c., where a cause is made a *remanet*, or goes off upon any other occasion, without the fault, contrivance, or acquiescence of the parties, and is afterwards brought to trial, see *post*, 1166.

As to the costs of a special jury, see *Vol. I.* 255.

Special Jury.

On Verdict for Defendant.] By the stat. 4 Jac. 1, c. 3, in all cases in which a plaintiff would be entitled to costs if he recovered, the defendant shall have his costs if a verdict be found for him (*v*). Also, by stat. 18 Eliz. c. 5, in actions upon penal statutes by common informers, the defendant is entitled to his costs, if he have a verdict (*x*), though the plaintiff would not be entitled even if he succeeded.

On Verdict for Defendant.

(*o*) *Greenwood v. Johnson*, 3 Dowl. 606.

(*p*) *White v. Prickett*, 6 Dowl. 445.

(*q*) *Bates v. Pilling*, 2 Dowl. 367; 2 C. & M. 374. S. C.: *Amor v. Blofield*, 1 Dowl. 277; 2 Moo. & Sc. 156; 9 Bing. 91, S. C.: *James v. Askew*, 3 Nev. & P. 495; 8 A. & E. 351, S. C.: *Robinson v. Powell*, Exch., M. 1839, 3 Jurist, 1033.

(*r*) *Reynolds v. Matthews*, 7 Dowl. 586.

(*s*) See *Edwards v. Jones*, 2 M. & Wels. 414; 5 Dowl. 585; 7 Car. & P. 633. S. C.: *Amor v. Blofield*, 9 Bing. 91; 2 Moo. & Sc. 156; *Wilson v. Broughton*, 2 Dowl. 631; *Preedy v. Macfarlane*, 1 C., M. & R. 819; 3 Dowl. 458, S. C.: and see *Berry v.*

Adamson, 6 B. & Cres. 528; 9 D. & R. 558, S. C.: *Wilson v. Broughton*, 2 Dowl. 631.

(*t*) *Costello v. Corlett*, 4 Bing. 474; 1 Moo. & P. 315. S. C.: *Handley v. Levey*, 8 B. & C. 637; 3 M. & R. 37, S. C.: *James v. Dawson*, 1 Dowl. P. C. 341; *Connell v. Watson*, 2 Dowl. 139.

(*u*) 5 G. 4, c. 106.

(*v*) See also 23 H. 8, c. 15: *Millar v. Yerraway*, 3 Burr. 1723; 2 Bac. Abr., Costs, D.; *Hullock*, 121, 134.

(*x*) *Hullock*, 214, 220: see *Kirkham v. Wheeley*, 1 Salk. 30; *Wilkinson v. Allott*, Cowp. 366; *Garland v. Burton*, 2 Str. 1193.

By the 3 & 4 W. 4, c. 42, s. 32 (*y*), "where several persons shall be made defendants in *any personal action*, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a *verdict* pass for him or them, every such person shall have judgment for, and recover, his *reasonable costs*, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action." It has been decided since this act, that where several defendants are sued in trespass, and a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs after deduction of all the costs of all the defendants (*z*). Also, where there are several defendants, and one of them gets a verdict, he will be entitled to all his separate costs, and also *primâ facie* to an aliquot portion of the joint costs of the defence, unless the master is satisfied that some smaller portion should be allowed by reason of any special circumstances; and he will be thus in general entitled to his costs, although he has pleaded the same pleas, and by the same attorney as the other defendants; although formerly, in the latter case, only 40s. used to be allowed him (*a*). Where two defendants in trespass severed in pleading, but pleaded the same pleas, all going to the whole action, and one succeeded upon all the issues, the other upon one only, each defendant was considered entitled to his separate costs of the issues in which he succeeded; but the defendants having appeared by separate attorneys and counsel, the attorneys being members of the same firm, and the briefs and evidence substantially the same, the master taxed the costs as if the parties had appeared by the same attorney: it was admitted by the court, that the taxation of the costs in that respect could not be disturbed (*b*). Notwithstanding a judge certifies under this act in an action against officers of

(*y*) By statute 8 & 9 W. 3, c. 11, if in trespass, assault, false imprisonment, or ejectment, there were several defendants, and one of them was acquitted, the defendant so acquitted might (as he now may since that act) recover his costs, in the like manner as if a verdict had been given against the plaintiff, unless the judge, immediately after the trial, in open court, certified upon the record that there was a reasonable cause for making such person a defendant. (See *Aaron v. Alexander*, 3 Camp. 35; *Hullock*, 140, 144). This statute, however, was confined to the particular actions mentioned in it, and did not extend to replevin (*Mariner v. Barrett*, 3 Burr. 1284; *Ingle v. Wordsworth*, 1 W. Bl. 355), or to an action on the case for a tort, (*Dibben v. Cooke*, 2 Str. 1005), or trover, (*Poole v. Boulton*, Barnes, 139), or to debt on bond against executors, where one of them was acquitted on the plea of *plene administravit præter*. (*Norfolk, Duke of, v. Anthony*, Tidd, 986). In cases within the statute, if the defendants had pleaded jointly, only 40s. costs were allowed to the defendant acquitted. (*Hughes v. Chitty*, 2 M. & Sel. 172). Upon the stat. 52 G. 3, c. 113, s. 93, (*Birmingham Pav-*

ing Act), which gives costs in all cases where a verdict shall be found for any defendant, it was held that four of several defendants who had obtained verdicts were entitled to costs, although the verdict was against the rest. (*Hall v. Smith*, 9 Moore, 477; 2 Bing. 267, S. C.) In all cases not within the statute, if the plaintiff had proceeded to trial against several defendants, and obtained a verdict against any one of them, the others were not entitled to costs, the court having construed the former acts to relate only to the case of an acquittal of all the defendants. (*Dibben v. Cooke*, 2 Str. 1105: see *Murray v. Nicholls*, 4 Moo. & P. 280).

(*z*) *Starling v. Couzens*, 2 C., M. & R. 445; 3 Dowl. 782; 1 Gale, 159, S. C.: and see *Gougenheim v. Lane*, 4 Dowl. 482; 1 M. & W. 136, S. C.: *Allenby v. Proudlock*, 5 Nev. & M. 636; 4 A. & E. 326, S. C.

(*a*) See *Griffiths v. Jones*, 4 Dowl. 159; *Starling v. Couzens*, *ubi supra*.

(*b*) *Gambrell v. Earl Falmouth*, 5 Ad. & El. 403; 6 Nev. & M. 859, S. C.: see *George v. Easton*, 1 Scott, 518; 1 Bing. N. C. 513, S. C.: *Lees v. Kendall*, 1 H. & W. 316; 3 Ad. & El. 707, S. C.: *Nanny v. Kenrick*, 2 Dowl. 334.

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PART I.

Where some
only of the
Defendants
go to Trial,
&c.

the metropolitan police, for matters done in execution of the 10 *G. 4, c. 44, s. 41*, the officers are entitled to their cost, as between attorney and client (*c*).

Where some only of several defendants proceeded to trial, the others suffered judgment by default, and those who proceeded to trial obtained a verdict, the defendants who obtained a verdict in such a case were entitled to their costs under the above statute of 4 *J. 1, c. 3*, and although the plaintiff had his judgment and costs against the others who suffered judgment by default (*d*); and this is still the law. And that act extends to an action on the case as well as other actions (*e*). So, if one of several defendants permit judgment to go by default, and the other plead a plea which goes to the whole declaration, and such plea be found for the defendant pleading it, he shall have costs, and such plea being an absolute bar to the action, the other defendant shall have the advantage of it; and shall not pay costs to the plaintiff upon the judgment by default (*f*). Where, in an action *ex contractu* against several defendants, who sever in their defences, judgment is obtained by one whose plea amounts to an absolute bar, the other defendants will be entitled to the benefit of it, and not liable to pay costs; but if such plea be merely a personal discharge to the party pleading it, the others will still be liable to the plaintiff for costs, if they fail on their own pleas, though the plaintiff fail as to the other (*g*).

By and to
what Defend-
ants payable.

Where there are several defendants who succeed in the action, the plaintiff may pay costs to which of them he pleases; and when they fail, each defendant is liable for the whole costs; but if after satisfaction from any one the plaintiff takes out execution against another, such defendant may apply to the court (*h*). Where the plaintiffs brought four actions against two insurance companies for a loss by fire, and a verdict was found for the former against each company on two of the causes only, the court held that costs were to be apportioned equally, although three causes only were set down for trial at the same sittings, there being a demurrer pending in the other (*i*). One defendant, who had given a general release to the plaintiff after the costs of nonsuit had been taxed, was ordered to pay to the other defendants their shares (*k*).

The Costs
must be taxed
at same Time.

Where several defendants obtain a verdict generally, their costs must be taxed at the same time, though they defend separately (*l*).

Where there
are several
Issues.
Where several
Pleas are

Where there are several Issues.] As to double pleas:—By the 4 & 5 *A. c. 16, ss. 4, 5*, any defendant, or plaintiff in replevin, may, with leave of the court, plead as many several matters as he shall think necessary for his defence, provided

(*c*) *Humphrey v. Woodhouse*, 1 Scott, 395; 3 Dowl. 416; 1 Bing. N. C. 506, S. C.

(*d*) *Shrubb v. Barrett*, 2 H. Bl. 28.

(*e*) *Price v. Harriss*, 10 Bing. 557; 4

Moo. & Sc. 474; 2 Dowl. 804, S. C.: *Shrubb v. Barrett*, 2 H. Bl. 28.

(*f*) *Tidd*, 985: *Hull, Costs*, 143.

(*g*) *Noke v. Ingham*, 1 Wils. 89: *Baylis v. Dineley*, 2 Chit. Rep. 153.

(*h*) *Wilson v. Foote*, Bull. N. P. 335.

(*i*) *Severn v. Olive*, and *Severn v. Slade*, 6 Moore, 235.

(*k*) *Darlow v. Collinson*, Bull. N. P. 335.

(*l*) *Smith v. Campbell*, 6 Bing. 637.

that if any such matter shall, upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the court (*m*); or if a verdict shall be found upon any issue in the said cause for the plaintiff, or defendant in replevin, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said defendant or plaintiff in replevin had a probable cause to plead such matter (*n*). Where the defendant pleads several pleas in bar, each going to the whole declaration, if he succeed upon any one sufficient plea, he must have judgment upon the whole declaration, although the plaintiff succeed upon the other pleas, because by his plea he has shewn that the plaintiff had no sufficient cause of action against him; and in such a case he is entitled to the *postea*, and the costs of the cause (*o*), with the exception of the costs of such part of the pleadings and briefs, and of such of the witnesses, &c., as are applicable only to the issues found for the plaintiff (*p*). And by virtue of the above clause of the stat. 4 & 5 A. c. 16, if the plaintiff also succeed, either upon demurrer or by verdict, upon any of the other pleas, he shall have his costs of the issue or issues upon which he has so succeeded, to be deducted from the defendant's costs, unless the judge certify that the defendant had probable cause for pleading those pleas upon which the plaintiff succeeded (*q*); and the same as to a defendant or avowant in replevin (*r*). Thus, in trespass, where defendant pleads "not guilty," and son assault demesne, and has a verdict on the latter plea, he is not entitled to the costs of the former (*s*). And in slander, where defendant pleads "not guilty" and a justification, and succeeds on "not guilty" only, the plaintiff is entitled to his costs on the other issue, notwithstanding 21 J. 1, c. 16, s. 6 (*t*). The costs in these cases are the costs of such part of the pleadings and briefs, and of such of the witnesses, &c., as are applicable to the issues found for the plaintiff (*u*).

In a recent case, where, to a declaration in two counts, defendant pleaded two pleas to the first count and one to the second, issues were joined on one plea to the first count, and on the plea to the second count; the other plea was demurred to: the plaintiff took the issues of fact to trial, and a verdict was found for the plaintiff on the issue on the first count, and damages assessed, and for the defendant on the issue on the second count: afterwards on the demurrer to the other plea to the first count the defendant had judgment:—it was held, that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded, including (in addition to the pleading) briefs, witnesses, &c.; and that no objection arose from his having tried the issues in fact before that in law;

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pleaded under
4 & 5 A. c. 16,
and Defen-
dant succeeds
on one to the
entire Cause
of Action.

(*m*) See *Duberley v. Page*, 2 T. R. 391.
(*n*) See the words of the act, *ante*, Vol. I. 172; *Bull. N. P.* 334; *Hullock*, 99 to 119.

(*o*) *Ragg v. Wells*, 8 Taunt. 129; *Cross v. Johnson*, 9 B. & Cres. 613; *Frankum v. Lord Falmouth*, 4 Dowl. 65; *Staley v. Long*, 5 Dowl. 616.

(*p*) See *Kirk v. Nowill*, 1 T. R. 266; and the cases *post*, 1159, 1160.

(*q*) *Duberley v. Page*, 2 T. R. 391; *Jones v. Davies*, *Barnes*, 141; *Hullock*,

100—108; *Bennett v. Coster*, 1 B. & B. 465.

(*r*) *Dodd v. Joddrell*, 2 T. R. 235; *Bright v. Jackson*, *Barnes*, 144; *Stone v. Forsyth*, 2 Dougl. 709, n.; and see *Bird v. Higginson*, 5 Ad. & El. 91.

(*s*) *Mullins v. Scott*, 5 Bing. N. C. 423.

(*t*) *Skinner v. Shoppy*, C. P., M. 1839; 3 Jurist, 1127.

(*u*) See the cases cited *post*, 1159, 1160; *Cartwright v. Cook*, 1 Dowl. 529; *Richards v. Cohen*, Id. 533; *Brooke v. Willett*, 2 H. Bl. 435; *Follum v. Sampson*, 2 B. & P. 368.

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especially as a judge at chambers had refused an application, by the defendant, to order the trial of the issues in fact to be postponed till judgment was given on the demurrer (*v*).

Where to trespass the defendant pleaded, 1st, the general issue; and, 2ndly, a special plea, to which the plaintiff replied a prescriptive right; and issue was thereupon joined; there was a verdict for plaintiff with 1s. damages on the general issue, and for the defendant on the second issue; but the latter going to the whole cause of action, the court held that the plaintiff was not entitled to the costs of the cause (*x*). And the same has been decided in an action for a libel, where the defendants pleaded the general issue and a justification (*y*).

Where Defendant succeeds on a Plea going only to part.

What has now been said, however, as to costs, where there is double pleading under the statute of Anne, must be considered as applicable only to cases where the defendant succeeds upon a plea which goes to the whole declaration; if he succeed on a plea which only goes to part, and the plaintiff succeed on any other part of the declaration, the plaintiff will be entitled to the *postea* and his general costs, according to the rule first above laid down. So, where the defendant pleads several pleas, each going to the whole of the declaration, and the plaintiff new assigns upon one of the pleas: as the new assignment must be considered in the nature of a new count, if the defendant do not succeed, as well upon some plea which is a bar to the whole of the new assignment, as upon a plea which is a bar to the declaration, the plaintiff will in like manner be entitled to the *postea* and the general costs.

Where Judge certifies under the 43 Eliz. c. 6.

The statute of Anne does not operate so as to give full costs to the plaintiff in the case of double pleading, where the damages are under 40s., and the judge certifies under the stat. 43 *El.* c. 6, before mentioned (*z*), even although all the issues be found for him (*a*).

The Certificate under 4 & 5 A. c. 16.

The certificate mentioned by the stat. of Anne may be given out of court. The power to grant it is not affected by *R. H.*, 4 *W.* 4, *r.* 7 (*b*).

Where there are several Counts or Pleas, and no distinct Matter of Complaint or Defence, *R. H.*, 4 *W.* 4, *r.* 5.

Where there are several counts or pleas, and the party fails to establish a distinct subject-matter of complaint or defence, we have seen (*ante*, *Vol. I.* 147) that, by the rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 5, "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each." And to enforce this rule it is also ordered by another rule, (*Id.*, *r.* 7, *ante*, *Vol. I.* 173); that "upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or

(v) *Bird v. Higginson*, 5 Ad. & El. 83; 6 Nev. & M. 791, S. C.

(x) *Vivian v. Blake*, 11 East, 263; see *Edwards v. Bethel*, 1 B. & Ald. 254; *Other v. Calvert*, 8 Moore, 239; 1 Bing. 275, S. C.; *Bennett v. Coster*, 4 Moore, 110; 1 B. & B. 465, S. C.

(y) *Alexander v. Lawson*, K. B., H. T. 1829.

(z) *Hoard v. Cheshire*, Say, 260.

(a) *Richmond v. Johnson*, 7 East, 583.

(b) *Robinson v. Messenger*, 3 Nev. & P. 583; 8 Ad. & E. 606, S. C.

defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings. And in all cases in which an application to a judge has been made under the preceding rule, (*r. 6, ante, Vol. I. 173*), and any count, plea, avowry, or cognizance, allowed as therein mentioned, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of such plea, avowry, or cognizance so allowed, if the court or judge before whom the trial is had shall be of opinion that no such subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance, with respect to which the judge shall so certify."

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Where to a declaration for a libel, the defendant pleaded the general issue and two special pleas, and at the trial the jury found all the issues for the plaintiff, and 1*s.* damages, and the judge certified, under the stat. 43 *Eliz. c. 6, s. 2*, the court held, that the plaintiff was not entitled to the costs of the issues found for him, notwithstanding the above rule of *Hil.*, 4 *W. 4, s. 7(c)*.

By the rule of *II.*, 2 *W. 4, r. 74*, "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." This rule was made for the benefit of defendants, and puts an end to the former unjust practice, in some cases, of allowing the plaintiff his costs, and, in others, of disallowing the defendant's costs on issues on which the defendant succeeded (*d*). In accordance with this rule, where the general issue was pleaded to a declaration containing several counts, and the defendant succeeded under it as to some of those counts, he was held entitled to the costs occasioned by them (*e*); for the general issue to the whole declaration, containing several counts, tends a distinct issue to each of the counts. Thus, where the declaration in an action for an illegal seizure and sale of plaintiff's goods under a warrant of distress contained nine counts, two of which went to the whole value of the property, while the remainder went to the injury to the goods,

R. H., 2 *W. 4*,
depriving
Plaintiff of
Costs of Issues
on which he
fails, and giv-
ing Defendant
Costs of Issues
on which he
succeeds.

(c) *Simpson v. Hurdiss*, 2 *M. & Wels.* 84; 5 *Dowl.* 304, *S. C.*: see the statute, *ante*, 1139.

(d) See *Butcher v. Green*, 2 *Doug.* 677; *Postan v. Stanway*, 5 *East*, 261; *Penson v. Lee*, 2 *B. & P.* 333; 4 *B. & Ald.* 43, 700; *Rees v. Commissioners of the Thames*, 3 *B. & B.* 117; 6 *Moore*, 324, *S. C.*: *Longden v. Bourne*, 1 *B. & Cres.* 278; *Cross v.*

Johnson, 9 *B. & Cres.* 278; *Astley v. Young*, 2 *Burr.* 1232.

(e) *Cox v. Thomason*, 1 *Dowl.* 575; 2 *C. & J.* 498, *S. C.*: *Knight v. Brown*, 1 *Dowl.* 733; *Ward v. Pell*, 1 *C. & M.* 848; 2 *Dowl.* 76, *S. C.*: *Knight v. Brown*, 2 *Moo. & Scott*, 797; 9 *Bing.* 643; *Doe v. Webber*, 4 *Nev. & M.* 381.

and the verdict was for the plaintiff on the two first counts, and for the defendants on the others, which became immaterial when the plaintiff recovered for the entire value of the property, it was held that the defendant was entitled to deduct the costs of those issues from the plaintiff's costs (*f*). Where, in case for a libel on the general issue, the jury found for the plaintiff, and also found as a fact that a great part of the declaration did not apply specifically to the plaintiff, though there were innuendos by which it was endeavoured to connect him with the matters complained of; it was held that the defendant was entitled to the costs of that part (*g*). So, in ejectment, where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the court held that the defendant was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff, under the above rule (*h*). And the same, where there were several demises, and the jury found for the plaintiff on some, and for the defendant on others (*i*). So, in covenant, if there be several breaches assigned, the defendant will be entitled to the costs of the issues found for him (*k*). And the same, where to trespass for breaking and entering the plaintiff's house, and converting his goods, the defendant, among other pleas, pleaded that the house and goods were not plaintiff's, and the jury found for the plaintiff as to the entering the house and taking one parcel, and for the defendant as to the other parcel (*l*). But where in an action against owners of a ship for negligently stowing &c. certain casks, the defendants traversed the breach of contract, and the jury found for the plaintiff as to one cask, and for the defendant as to the residue, it was held that the issue was not divisible, so as to entitle the defendant to costs of the portion found for him (*m*). On the other hand, if the defendant plead the general issue, and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas, though the defendant would get the general costs of the cause (*n*). Where, in replevin, the defendant pleaded that the goods belonged to himself and others, as assignees under a commission of bankruptcy, and also avowed for taking goods, as a distress for rent in arrear; a verdict having been found for the plaintiff on the issue joined on the plea, and for the defendant on the avowry, the court refused to allow the defendant costs on the issue found for the plaintiff (*o*). Where, in trespass for seizing goods, the defendants pleaded two pleas, one justifying upon

(*f*) *Newton v. Harland*, 5 Dowl. 644.

(*g*) *Prudhomme v. Fraser*, 1 Harr. & W. 5; 4 Nev. & M. 512; 2 Ad. & El. 645, S. C.; and see *Doe Smith v. Payne*, 1 H. & W. 10.

(*h*) *Doe v. Errington*, 4 Dowl. 602; 1 H. & W. 502, S. C.: see *Doe v. Webber*, 4 Nev. & M. 381.

(*i*) *Doe v. Webber*, 4 Nev. & M. 381; 1 H. & W. 10, S. C.

(*k*) *Daubuz v. Rickman*, 4 Dowl. 129.

(*l*) *Routledge v. Abbott*, 3 Ad. & El. 592:

see form of *postea*, *Ibid*.

(*m*) *Anderson v. Chapman*, Exch., M. 1839; 3 Jurist, 1154.

(*n*) *Hart v. Cutbush*, 2 Dowl. 456, per Parke, J.; *Spencer v. Hamerton*, 6 Nev. & M. 22; 4 Ad. & El. 413: *Robert v. Phillips*, 5 Dowl. 473; 2 M. & W. 40, S. C.: *Bird v. Higginson*, 5 Ad. & El. 83; 6 Nev. & M. 791, S. C.

(*o*) *Vallance v. Evans*, 1 C. & M. 856; 3 Tyr. 865; 2 Dowl. 118, S. C.

a distress for rent due under a demise, at 5*l.* a-year, and another for 2*l.* 10*s.*, and both issues were found for him, the court held that they were not inconsistent; and the judge having certified, at the trial, to deprive the plaintiff of costs, the rule for taxing to the defendants the costs of the two issues found for them was drawn up with this additional clause, "and that the costs, when so taxed, be paid by the said plaintiff to the said defendants:" but the court held that they had no power to make such an order, and they directed the record to be amended, by an entry of a judgment for the costs of those two issues, upon which the defendants might proceed to obtain their costs, if they thought proper (*p*). In the case of a reference to arbitration, before issue joined, the above rule must be observed on the taxation of costs (*q*). Neither party will be entitled to the costs of issues from the trial of which the jury have been discharged (*r*). And where a verdict is found in favour of the defendant, and judgment is afterwards entered for plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues (*s*). So, where the plea on which he has obtained a verdict, on being brought before the court upon a special case, is found to be bad, he will not be entitled to costs upon that issue (*t*); but if it be found good, he will be entitled to the costs of the special case, &c., together with the costs of the issue (*u*). If a defendant seek to enter a suggestion to deprive the plaintiff of costs, on the ground that the action ought to have been brought in a court of requests, he cannot, at the same time, have the costs of issues which have been found in his favour taxed for him in the superior court (*v*). The above rule of *H. T.*, 2 *W.* 4, *r.* 74, does not apply to *paupers*; and therefore, where in an action of trespass and false imprisonment, brought by a pauper against several defendants, the jury acquitted some of them, and found a verdict against the others, the court held that the costs of such of the defendants who had obtained verdicts could not be deducted from the plaintiff's costs of the cause (*w*).

As to costs where there are several defendants, some of whom succeed, and some are defeated, see *ante*, 1153.

As to the mode of taxation in these cases, supposing that there are several issues, and one be found for the plaintiff and the other found for the defendant, if that found for the plaintiff be the *substantial issue* in the cause, he shall have the *postea* and the general costs of the cause, with the exception of the costs of such parts of the pleadings and briefs, and of such of the witnesses, &c. (*x*), as are applicable only to the

Several Defendants.

Mode of Taxation where some Issues are found for Plaintiff and some for Defendant.

(*p*) *Twigg v. Potts*, 4 Dowl. 266.

(*q*) See *Daubuz v. Rickman*, 4 Dowl. 129; 1 Scott, 564; 1 Hodges, 75, S. C.; *Milner v. Graham*, 2 Dowl. 422; *Allenby v. Proudlock*, 5 Nev. & M. 636; 4 Ad. & El. 326, S. C.

(*r*) *Vallance v. Adams*, 2 Dowl. 118; 1 C. & M. 856; 3 Tyr. 865, S. C.

(*s*) *Goodburne v. Bowman*, 3 Moo. & Scott, 69; 9 Bing. 667; 2 Dowl. 206, S. C.; and see *Da Costa v. Clarke*, 2 B. & P. 376; *Kirk v. Nowill*, 1 T. R. 266.

(*t*) *Cartwright v. Cook*, 1 Dowl. 529.

(*u*) *Gosbell v. Archer*, 1 Har. & W. 559;

2 Ad. & El. 500; 4 Nev. & M. 485, S. C.

(*v*) *Jenks v. Taylor*, 1 M. & W. 578.

(*w*) *Gougenheim v. Lane*, 4 Dowl. 482; 1 M. & W. 136; 1 Tyr. & G. 216; 1 Gale, 343, S. C.

(*x*) See *Eades v. Everett*, 3 Dowl. 687; *Richards v. Cohen*, 1 Dowl. 533; and see *Knight v. Moore*, 3 Bing. N. C. 535; 5 Dowl. 487, S. C.; *Doe Smith v. Webber*, 4 Nev. & M. 381; 2 Ad. & El. 448; 1 H. & W. 10, S. C.

BOOK IV.
PART I.

issue on which the defendant has succeeded, which costs the defendant will be entitled to have deducted from the plaintiff's costs. And it is further to be observed, as to the costs of the witnesses, that where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues found against him as on the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his (*y*). But, in such a case, the defendant has been held to be entitled to the costs of his witnesses, if their evidence was substantially directed towards the issues found for him, although they gave some slight evidence on the issues found against him (*z*). In a late case, however, where the plaintiff substantially succeeded, the Court of Exchequer recognised and acted upon the rule laid down by *Bayley, B.*, in *Lardner v. Dick* (*a*), that where some issues are found for the plaintiff, and some for the defendant, the latter is not entitled to the expense of his own witnesses, unless their evidence related *exclusively* to the issues found for him (*b*). The converse of the same rule would be applicable to the taxation of costs, if the defendant were substantially the successful party in the cause; in such case, he would be entitled to the general costs of the cause, and to the costs of the witnesses called in support of the issue on which he has substantially succeeded, although they may also have given evidence on the other issues (*c*). The defendant is entitled to the costs of all issues found for him, although they exceed the plaintiff's costs, notwithstanding the above rule, *H. T.*, 2 *W.* 4, uses the word "deduct" (*d*); and if they exceed the plaintiff's costs, the defendant may have judgment and execution for their recovery (*e*). It may be here added, that, in general, the question as to whether particular costs incurred in relation to the trial of the cause, are referable to one issue or another, is a question of fact for the decision of the master alone, and the court will not interfere with it (*f*).

Double and
treble Costs.

Double and treble Costs.] Only single costs were allowed by the statute of Gloucester, but double and treble costs have since that act, in some cases, been expressly given by statute. Also, where a statute gives double or treble damages, where damages were recoverable at common law, the plaintiff shall also have double or treble costs (*g*), but not where damages were not recoverable at common law (*h*). And not only the costs given by the jury shall be doubled or trebled, but also the costs *de incremento* (*i*). But it is only the ordinary costs

(*y*) *Richards v. Cohen*, 1 Dowl. 533; *Lardner v. Dick*, 2 Id. 333; 2 C. & M. 389, S. C.; *Hart v. Cutbush*; *Bird v. Higginson*; *Spencer v. Hamerton*; *Roberts v. Phillips*, ante, 1158.

(*z*) *Eades v. Everett*, 3 Dowl. 687.

(*a*) 2 C. & M. 389; 2 Dowl. 333.

(*b*) *Crowther v. Elwell*, 4 M. & W. 71.

(*c*) *Knight v. Moore*, 3 Bing. N. C. 534; 5 Dowl. 487, S. C.; *Robert v. Phillips*, 5 Dowl. 473; and see *Ragg v. Wells*, 8 Taunt. 129; *Cross v. Johnson*, 9 B. & C. 613; *Vivian v. Blake*, 11 East, 263.

(*d*) *Milner v. Graham*, 2 Dowl. 422; see

Twigg v. Potts, 4 Id. 266.

(*e*) See *Twigg v. Potts*, 4 Dowl. 266.

(*f*) *Doe Smith v. Webber*, 4 Nev. & M. 381; 2 Ad. & El. 448; 1 H. & W. 10, S. C.

(*g*) 2 Bac. Abr., Costs, C.; Bull. N. P. 334; see *Butterton v. Furber*, 4 Moore, 296; 1 B. & B. 517, S. C.

(*h*) *Okely v. Salter*, Noy, 137; see *Butterton v. Furber*, 1 B. & B. 517; 4 Moore, 296, S. C.; *Charrington v. Meatheringham*, 5 Dowl. 313.

(*i*) *Smith v. Dunce*, 2 Str. 1048.

of the cause that are thus doubled or trebled; and, therefore, where the plaintiff changed the venue to X., on undertaking to pay the defendant's extra costs of trying at X., and the defendant obtained a verdict, and was entitled by statute to double costs, it was held that the extra costs of trying at X., should not be doubled (*k*). Where a statute gives double costs to defendants, in case the plaintiff fails, the defendants who obtain a verdict, are entitled to their double or treble &c. costs, though the plaintiff obtains a verdict against the others (*l*). In an action upon a statute which gives double costs, if a new trial be granted, nothing being said on the subject of costs, the party who succeeds on both trials is entitled to double costs of both (*m*). Where the declaration contained several counts, and the defendants obtained a general verdict, it was held that they were not entitled to treble costs on the counts which complained of acts prohibited by the statute which entitled them to treble costs in case of success (*n*).

By double or treble costs, however, are meant, not double or treble the single costs; the true mode of estimating the amount of the *double* costs is, first to allow the prevailing party, the single costs, including the expenses of witnesses, counsel's fees, &c., and then allow him one half of the amount of the single costs, without making any deduction on account of counsel's fees, &c. (*o*). *Treble* costs consist of the single costs, half of the single costs, and half of that half (*p*).

How estimated.

Where there are several issues, some found for plaintiff, and some for defendant, and defendant is entitled to treble costs, the proper mode of estimating them, is first to ascertain the defendant's single costs, then treble them, and then deduct the plaintiff's single costs from the amount so trebled (*q*).

Unless the statute require it, no suggestion on the roll is, in general, requisite to entitle the party to these costs; at least, not if it appear by the record that the case is within the statute (*r*). Where a rule *nisi* was obtained to enter a suggestion for double costs, and it appeared on shewing cause that the double costs had been previously tendered, the rule was discharged with costs (*s*).

Suggestion for, when necessary.

Where a statute requires a judge's certificate, to entitle the party to double or treble costs, such certificate need not, in general, be given immediately after the trial of the cause (*t*). Of course, the master cannot in such case tax the double or treble costs until the certificate is obtained. It may be added, that it has recently been decided by the Court of Common Pleas, confirming the old authorities, that a magistrate sued for an act done in his judicial character must, in order

Certificate for, when granted, &c.

(*k*) *Thomas v. Saunders*, 3 Nev. & M. 572.

(*l*) *Hall v. Smith*, 2 Bing. 267; 9 Moore, 477, S. C.

(*m*) *Loader v. Thomas*, 1 C. & J. 54.

(*n*) *Wilson v. River Dun Company*, 5 M. & W. 89; 7 Dowl. 369, S. C.

(*o*) *Staniland v. Ludlam*, 4 B. & C. 889; 7 D. & R. 484, S. C.

(*p*) *Hullock*, 484: see *Phillips v. Bacon*, 1 Chit. Rep. 137, n.: *Buckle v. Bewes*, 6

D. & R. 1; 4 B. & C. 154, S. C.

(*q*) *Wilson v. River Dun Co.*, 5 M. & W. 89; 7 Dowl. 369, S. C.

(*r*) See *Wells v. Ody*, 3 Dowl. 799; 2 C., M. & R. 128, S. C. It was a case under the Building Act. (See *Collins v. Poney*, 9 East, 222).

(*s*) *Fosbrook v. Holt*, 1 M. & W. 205; 4 Dowl. 700, S. C.

(*t*) *Norman v. Danger*, 3 Y. & J. 203.

BOOK IV.
PART I.

Repeal of Act
giving double
&c. Costs
pending Suit.

to obtain double costs under 7 *Jac.* 1, *c.* 5, obtain the certificate of the judge before whom the cause is tried (*u*).

Where a statute giving double or treble &c. costs is repealed during the pendency of a suit, the right to receive them is thereby destroyed, unless expressly saved (*x*).

2. Taxation of Costs.

2. Taxation
of Costs.

The taxation of an attorney's bill of costs as between him and his client, has been fully considered in the first Volume, and the subject of taxation of costs, in particular instances, has been incidentally noticed in many parts of the Work. It may be well, however, to consider the practice of taxation, as between party and party, here in one view.

By whom
taxed.

By whom Taxed.] By the 1 *Vict. c.* 30, *s.* 3, the masters of the respective courts of law are authorized and required to tax all costs in matters of a civil nature in any of the courts, or in the Exchequer Chamber, indiscriminately, although the costs may not have arisen in respect of business done in the court, to which such masters may belong; and the judges are authorized to make rules on the subject (*y*).

Notice of
Taxation,
Affidavit of
Increase, &c.

Notice of Taxation, Affidavit of Increase, &c.] By rule of *T. T.*, 1 *W.* 4, *r.* 12, it is ordered, "that *before taxation of costs, one day's notice (z) shall be given to the opposite party (a)*. But this rule only applies to cases in which a notice of taxation is necessary (*b*): and such notice is not necessary upon a *cognovit*, where it is given in a sum certain for the amount of debt and costs; for as to the costs of the action, they are already fixed at a certain sum (*c*); and as to the costs of signing judgment, a fixed sum is always marked without taxation (*d*). And by the *R. H.*, 4 *W.* 4, *r.* 17, "*notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian.*" And it is not necessary where the plaintiff has entered an appearance for the defendant (*e*). Nor, in such a case, is it necessary to deliver a copy of the bill of costs, or affidavit of increase in the Exchequer, notwithstanding the rule of that court *M. T.* 1830, *s.* 12 (*f*). But it is necessary where the defendant has done that which is equivalent to appearing (*g*). A service of this notice of taxation at any time before nine o'clock at night for the next day would suffice (*h*). If the opposite party, however, wishes a longer notice, he may, it seems, gain it by obtaining from the master a rule, to be *present at the taxation, and serving a copy of it on the attorney of the prevailing party before the time for signing judgment*

(*u*) *Penny v. Slade*, 7 Dowl. 440; 5 Bing. N. C. 469.

(*x*) *Warne v. Beresford*, 6 Dowl. 157; *Charrington v. Meatheringham*, 5 Dowl. 464; see *R. v. Mawgan*, 3 Nev. & P. 502; 8 Ad. & El. 496, S. C.

(*y*) See the sect. verbatim, Vol. I. 80.

(*z*) Notice given at any time before nine o'clock on the previous evening is sufficient. (*Edmunds v. Coates*, 4 M. & W. 66).

(*a*) See the form, Chit. Forms, 632.

(*b*) *Griffiths v. Liversedge*, 2 Dowl. 143.

(*c*) It would be different if they were not. (See *per Patteson, J.*, 2 Dowl. 143).

(*d*) *Griffiths v. Liversedge*, 2 Dowl. 143; *Clothier v. Ess*, 3 Moo. & Sc. 216; *Clarke v. Jones*, 3 Dowl. 277.

(*e*) *Bolton v. Maning*, 5 Dowl. 769; *Burch v. Pointer*, 3 M. & W. 310; 6 Dowl. 387, S. C.

(*f*) *Burch v. Pointer*, 6 Dowl. 386; 3 M. & W. 310, S. C.

(*g*) *Lloyd v. Kent*, 5 Dowl. 125.

(*h*) *Edmunds v. Coates*, 4 M. & W. 96.

has expired; the latter must then give *twenty-four hours'* previous notice of taxing costs; and if the costs are taxed without such notice, the taxation would be irregular, and the attorney liable to an attachment; but if this rule to be present is not served until the time for signing judgment has expired, he is not obliged to give more than the above one day's notice, which, as we have just seen, may be given at any time before nine at night for the next day (*i*). It may be as well here observed, that this notice of taxation, or the first appointment made by the master, is *peremptory*, and he will proceed *ex parte* thereon, unless sufficient cause is shewn for the postponement (*j*). Any reasonable costs incurred in serving this notice will be allowed (*k*). As regards the consequences of omitting to give this notice when requisite, it seems that the omission will not afford a ground for setting aside the judgment and execution; and that all the court will do will be to refer it to the master to re-tax the costs; and if, upon the taxation, there be any reduction of the amount, they will make the party whose costs are taxed pay the costs of the rule; or, if nothing be taxed off, they will not allow costs on either side (*l*). If the attorney for the opposite party attend the taxation, he thereby waives all irregularity as to notice (*m*).

The master will tax the costs upon a view of the proceedings, but if there be extra expenses incurred, which do not appear upon the face of the proceedings; such as witnesses' expenses, fees to counsel, attendances, court fees, &c., an affidavit must be made of these extra costs, otherwise the master will not be warranted in allowing them (*n*). Such affidavit should be left at the master's office one clear day before the day appointed for taxation (*o*).

Affidavit of Increase.

In the Exchequer, by rule *M. T.* 1830 (*p*), a copy of the bill of costs and affidavit of increase must be delivered to the opposite attorney one day previous to the taxation in the case of town *posteas* and inquisitions, and two days previous to the taxation in country ones. And this rule is imperative, and must be complied with, unless the opposite party waives his right under it by attending the taxation or otherwise (*q*). It does not, however, extend to cases where the defendant has not appeared, or when he appears himself, and not by attorney (*r*), or to the taxation of costs upon a demurrer; and even in cases within the rule, the omission to comply with it is not a ground for setting aside the judgment, but merely for a rule to review the taxation (*s*).

Delivery of Copy, Bill of Costs, and Affidavit &c. in Exchequer.

What Costs allowed, &c. (t).] The mode of taxation and amount of costs allowed between attorney and client, have been

What Costs allowed, &c.

(i) 1 Sellon, 504; Tidd, 989; *Edmunds v. Coates*, 4 M. & W. 66.

(j) R. H., 32 G. 3: 2 W. 4, r. 92.

(k) *Thorpe v. Wordy*, 2 C. & J. 488.

(l) *Lloyd v. Kent*, 5 Dowl. 125; *Bolton v. Manning*, 5 Dowl. 769.

(m) *Wilkins v. Perkins*, 2 M. & W. 315; 5 Dowl. 461, S. C.

(n) See the forms, Chit. Forms, 629 to 631.

(o) Chap. Prac. 156.

(p) 1 C. & J. 279; 1 Tyr. 161.

(q) *Wilkins v. Perkins*, 2 M. & W. 315; 5 Dowl. 461, S. C. Perhaps that part of this rule which requires a two days' notice of taxation upon country *posteas* and inquisitions is virtually rescinded by the subsequent rule of all the courts of T. T., 1 W. 4, r. 12. (See *Perry v. Turner*, 2 C. & J. 89; *Routledge v. Giles*, Id. 163).

(r) *Burch v. Pointer*, 2 Jurist, 278.

(s) *Taylor v. Murray*, 6 Dowl. 80.

(t) See Appendix, as to the amount of costs and fees regulated by rule of court.

BOOK. IV.
PART I.

Costs of regular and necessary Proceedings.

Costs of Letters.

Costs of Writs.

Costs of Pleadings.

Costs of Rules.

already noticed. In taxing costs between party and party, the master will allow the costs of all regular and necessary proceedings in the cause, and he will also allow all such incidental costs as are, or are to be, directed to be costs in the cause. Of course, he will not allow the costs of unnecessary proceedings(*x*).

An attorney is entitled to his costs for writing a letter to the defendant, demanding the debt before writ issued (*y*), the usual practice is to allow for one letter only; even where the defendant had requested that time should be given, and every accommodation was shewn by the plaintiff's attorney, and in the correspondence, before writ issued, plaintiff's attorney had written fifteen letters, and had received fourteen from the defendant, for thirteen of which he had paid postage, he was held entitled to the costs of only one (*z*). The plaintiff is entitled to the allowance of a sum, sworn to have been paid by him for the postage of foreign letters as being solely applicable to the cause; but he is entitled to the expenses of the production and translation of such letters only as are applicable to such parts of the counts as relate to the verdict (*a*).

The master has been held to be justified in allowing the costs of two writs issued in one action against the defendant into two counties, where it was doubtful in which county he was to be found (*b*), it not appearing that they were concurrent writs. But now, although several writs may be issued on one *præcipe*, it is probable that the plaintiff would be held entitled to the costs of one only (*c*).

The costs of all necessary pleadings will, of course, be allowed to the party who succeeds on them. The practice where there are several counts, or several pleas, has been already noticed (*ante*, 1154 to 1160). Where an attorney charged for a declaration as containing more folios than it really contained, and the master allowed the charge, the court ordered the taxation to be reviewed (*d*).

The party who substantially (*e*) succeeds on a rule which forms part of the regular proceedings in the cause, no mention of costs being made, will be entitled, if he also succeeds in the cause, to have the costs of the rule allowed him as costs in the cause (*f*). But he will not be so entitled to the costs of a rule merely collateral to the action; for instance, a rule to discharge defendant out of custody on the ground of coverture, or arrest in a wrong name (*g*). Where the defendant obtains a rule to deliver up the bill on which the action is brought, or the like, on payment of costs, this does not make him liable to the costs of previous rules which have been decided against him, but without mention of costs (*h*). If an attorney shew cause on his own behalf against a rule, his client not appearing, the costs of the at-

(*x*) *Jones v. Roberts*, 2 Dowl. 374: 3 M. & W. 57.

Heavn v. Battersly, 3 Dowl. 213: *Lewis v. Woolrych*, 3 Dowl. 692.

(*y*) *Morrison v. Summers*, 1 Dowl. 325; 1 B. & Ad. 559, S. C.

(*z*) *Capell v. Staines*, 5 Dowl. 770.

(*a*) *Lopez v. De Tastet*, 7 Moore, 120; 3 B. & B. 292.

(*b*) *Morris v. Hunt*, 1 Chit. 544.

(*c*) See *Angus v. Coppard*, 6 Dowl. 137;

(*d*) *Morris v. Hunt*, 1 Chit. 544.

(*e*) *M'Andrew v. Adams*, 3 Dowl. 120.

(*f*) See *Goodall v. Ray*, 4 Dowl. 1:

Mummery v. Campbell, 2 Dowl. 798.

(*g*) *Mummery v. Campbell*, 2 Dowl.

798.

(*h*) *Hannah v. Willis*, 5 Bing. N. C.

385.

torney will not be costs in the cause (*i*). The recovery of the costs of rules made absolute or discharged "with costs," is now much facilitated by the 1 & 2 *Vict. c. 110, s. 18.* (See *p. 1196*).

Where an amendment is allowed during the course of a cause on payment of costs, this means only the costs substantially occasioned by the amendment. Therefore, where a plaintiff, after plea pleaded, obtained leave to amend his declaration on payment of costs, by increasing the amount of damages, and defendant afterwards paid money into court, whereby one of his pleas became unavailable, the court held, that he was not entitled to the costs of such plea, since they were caused by his own act, and not by the amendment (*k*).

The costs of an attachment include all costs fairly incidental to the suing out the attachment, and amongst them they have been held to include the costs of an inquiry, directed by the court for the benefit of the defendant, in order to enable him to obtain his discharge (*l*).

As to the costs of the trial: where a London agent has been appointed to attend the trial of a cause, it is a matter within the discretion of the master, and with which, it seems, the court will not interfere, whether the costs of a journey to London by the country attorney, to attend the trial, or a reference of the cause shall be allowed (*m*). The usual fee for necessary attendance at the trial will be allowed, though the attorney be a party to the cause (*n*). And, where a member of the same firm as the attorney who conducted the cause attended as a witness, the court held that his expenses were properly allowed (*o*).

With regard to fees to counsel, the master exercises a discretion, regulated, to a certain degree, by the nature and magnitude of the cause. In cases of difficulty, in which points of law may arise, it is fit that the leading counsel should have the assistance of other gentlemen, to suggest what may be necessary in the course of discussion. In cases of that description, the allowance of counsel should not be regulated in the same manner as in an ordinary case, where no difficulty is likely to arise; accordingly, a plaintiff has been allowed for fees to three counsel in a case of difficulty (*p*). And where, in a case of difficulty, the master allowed for one counsel only, the court ordered his taxation to be reviewed (*q*). And the same where, in taxing defendant's costs on a new trial, in an action to recover 1,000*l.*, where strict cross-examination was necessary, the master disallowed the costs of a second brief and fees, on the ground that it did not appear that defendant had any witnesses to call (*r*). Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the master may

(*i*) *Southey v. Terry*, 2 Dowl. 522.

(*k*) *Gould v. Oliver*, 5 Bing. N. C. 115.

(*l*) *Tyler v. Campbell*, 5 Bing. N. C.

192.

(*m*) *Parsloe v. Foy*, 2 Dowl. 181: *Archer v. Marsh*, 7 Dowl. 541: see, however, *Madison v. Bacon*, 5 Bing. N. C. 246.

(*n*) *Jervis v. Dewes*, 4 Dowl. 764.

(*o*) *Butler v. Hobson*, 5 Bing. N. C. 128.

(*p*) *Morris v. Hunt*, 1 Chit. 544.

(*q*) *Grindall v. Goodman*, 5 Dowl. 378.

(*r*) *Maddison v. Bacon*, 5 Bing. N. C. 246.

BOOK IV.
PART I.Costs of
Briefs.

allow for fees to counsel on the second trial, with reference to the amount of those given on the first (*s*).

Where, in actions on a policy of insurance against several, the attorney had only made out a full brief in one case, and short statements in the others, but the master allowed for the full briefs in all, the Court of King's Bench made a rule for him to review his taxation (*t*).

Costs of Evi-
dence, &c.

The expenses of evidence and of witnesses generally form a very serious item in the costs of the cause, and the discretion of the masters as to these costs is almost unlimited. The costs of witnesses have been already considered in the first Volume, p. 236. And the costs of proceeding for the examination of witnesses abroad, have been treated of in Vol. I., p. 245. And the rules as to the costs of proving documentary evidence have been stated in Vol. I., p. 213. It will, therefore, only be necessary to mention here a few points as to the costs of other species of evidence. In an action on the case for the disturbance of a watercourse, the expenses of plans used for the information of the court at the trial have been allowed (*u*); so have costs of successful searches for pedigree (*v*). But the costs of experiments made to enable scientific men to give evidence, have been disallowed (*x*). A charge for a document tendered, but not received in evidence, cannot be supported (*y*).

Costs of Bill
of Excep-
tions.

A defendant in error after affirmance is entitled to double costs of settling the bill of exceptions, such costs being costs in error, and not in the court below (*z*).

Costs of other
Proceedings.

The costs, in case of plea in abatement (*a*), *nul tiel* record pleaded (*b*), on demurrer (*c*), in error (*d*), on *nonpros* (*e*), non-suit (*f*), new trial (*g*), *venire de novo* (*h*), judgment *non obstante veredicto* (*i*), arrest of judgment (*k*), and the various other proceedings in an action, are noticed under the respective heads, throughout the Work. (*See the Index*).

Costs where
the Cause is
made a Re-
manet, &c.

Where the cause is made a *remanet*, the costs incurred in bringing up witnesses, attendances, &c., are allowed to the party ultimately prevailing (*l*); and the same where a cause goes off upon any other occasion, without the fault or contrivance of the parties, and is afterwards brought to trial (*m*). Where one of the jurors absconded, and the plaintiff refused to proceed with the remaining eleven, and he afterwards took the cause down to trial, and had a verdict, he was held entitled to the costs of both trials (*n*). As to costs where a new trial is granted, see *ante*, 1104.

Where Venue
laid out of

A plaintiff laying his venue out of London or Middlesex

(*s*) *Wilkinson v. Malin*, 2 Dowl. 65: see *Lord v. Wardle*, 6 Dowl. 174.

(*t*) *Martineau v. Barnes*, 1 Tidd, 666.

(*u*) *Holmes v. Holmes*, 9 Moore, 158; 2 Bing. 75.

(*v*) *Johnson v. Lawson*, 2 Bing. 341.

(*x*) *Severn v. Olive*, 3 B. & B. 72; 6 Moore, 235, S. C.

(*y*) *Bagnall v. Underwood*, 11 Price, 511.

(*z*) *Francis v. Doe d. Harvey*, 5 M. & W. 273, in Cam. Scae.

(*a*) *Ante*, 656.

(*b*) *Ante*, 671.

(*c*) *Ante*, 667.

(*d*) *Ante*, Vol. I. 379.

(*e*) *Ante*, 1056.

(*f*) *Ante*, Vol. I. 314.

(*g*) *Ante*, 1104.

(*h*) *Ante*, 1107.

(*i*) *Ante*, 1108.

(*k*) *Ante*, 1110.

(*l*) *Standen v. Hall*, Say. 272; 1 Ld. Ken. 338; *Gibbins v. Philipps*, 8 B. & C. 438; 2 M. & R. 236, S. C.: *Sparrow v. Turner*, 2 Wils. 366.

(*m*) *Burchall v. Bellamy*, 5 Burr. 2693: see *Seeley v. Powis*, 3 Dowl. 372.

(*n*) *Harrison v. Bennett*, 1 Dowl. 627.

for the purpose of obtaining speedy execution, is entitled, if he succeeds, to his costs of trying in the place of trial, unless the venue has been so laid for the purpose of oppression (*o*).

As to the taxation of costs, where there are several defendants, see *ante*, 1153; where there are several issues, *ante*, 1154 to 1160; and where there are double or treble costs, *ante*, 1160.

Directions to taxing Officers as to the Taxation where Amount under £20 (p).] By R. H., 4 W. 4, "in all actions of *assumpsit*, *debt*, or *covenant*, where the sum recovered or paid into court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds without costs, the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed (*p*). Provided that in case of a trial before a judge of one of the superior courts, or judge of assize (*q*), if the judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale." Writs of inquiry are, it seems, included in these directions (*r*); and where the writ having been issued for more than 20*l.*, the plaintiff, before execution, (judgment having been signed as for want of a plea), had given credit for a cross demand, reducing the amount of his claim to 17*l.*, the court held that the costs should be taxed on the reduced scale (*s*). But the costs of a writ of inquiry in covenant for unliquidated damages are not to be taxed upon the reduced scale (*t*). Also where the plaintiff had recovered by verdict a sum beyond another sum paid into court, the two sums together amounting to 20*l.*, the court held that the taxation of costs ought not to be on the reduced scale (*u*). A recovery of a judgment under 20*l.* entered up under an award is within the above directions, and the costs should be taxed on the reduced scale accordingly (*x*), and the directions are not, it seems, confined to those cases only which are triable before the sheriff (*y*). In an action on an attorney's bill, to which there was a set-off, the cause being partially heard, was referred to the master, who was to enter into the whole account: the master found a balance in favour of the plaintiff of 2*l.* 12*s.*: it was held, that the costs should be taxed on the reduced scale (*z*). Where, in an action for unliquidated damages an order is made for staying proceedings on payment of a sum under 20*l.*, and costs to be taxed, the plaintiff is only entitled to costs on the lower scale (*a*).

It is not necessary for the judge who certifies under the proviso in the above rule, to enable a plaintiff to obtain full costs, Certificate to entitle Plain-

CHAP. XXXI.

London, &c., for sake of speedy Execution.

Where there are several Issues, Double Costs, &c.

Directions to taxing Officers as to the Taxation.

Where Amount under 20*l.*

(*o*) *Vere v. Moore*, 5 Dowl. 367; 3 Bing. N. C. 261, S. C.

(*p*) See the Appendix.

(*q*) See the scale in the Appendix at the end of Vol. II.

(*r*) It is not necessary for the judge who certifies to enable a plaintiff to obtain full costs, to hear the cause throughout. (*Nokes v. Frazer*, 3 Dowl. 330).

(*s*) *Hoppell v. Leigh*, 5 Dowl. 40; 3 Moo. & Scott, 188; 2 Hodges, 107, S. C.

(*t*) *Savage v. Lipscombe*, 5 Dowl. 365; *Patteson, J., diss.*

(*u*) *Craft v. Miller*, 3 Bing. N. C. 975; 6 Dowl. 73.

(*x*) *Masters v. Tickler*, 2 H. & W. 81.

(*y*) *Wallen v. Smith*, 3 M. & Wels. 138; 5 M. & W. 159; 6 Dowl. 163; 7 Dowl. 394, S. C.

(*z*) *Parker v. Serle*, 6 Dowl. 334.

(*a*) *Cook v. Hunt*, 7 Dowl. 397; 5 M. & W. 161, S. C.

BOOK IV.
PART I.tiff to full
Costs.

to hear the cause throughout(b); the cause need only be brought on for trial. There is no specific time in which the certificate must be given(c). If the cause be tried at *Nisi Prius*, and the judge before whom it is tried die without making his certificate, the plaintiff is without remedy as to the extra costs(d). Where a cause at *Nisi Prius* is referred to arbitration, care should be taken to give the arbitrator a power of certifying that the cause was proper to be tried before a judge, otherwise the attorney will only be able to claim costs upon the lower scale(e).

Reviewing
the Taxation.

Reviewing the Taxation.] The court or a judge will not, before taxation of costs, make an order as to the principle on which they are to be taxed, if objection be taken to that course(f), but they will sometimes order the taxation to be reviewed by the master, upon application by the party dissatisfied therewith, where the taxation has been made upon a wrong principle. Several instances of this have been given in the preceding pages. In general, however, the master is the sole judge as to what witnesses shall be allowed on taxation, and as to the mode of taxing costs; and the discretion used by him in taxation will not be brought into review before the court as a matter of course. Where the mistake, if any, arises from the ambiguity of an award, no attempt to set aside which has been made, the court will not interfere(g). The application to review the taxation must be supported by an affidavit pointing out specifically the objections to it(h). No objections can be gone into on the application, unless they are specified in the affidavit or rule(i). The affidavit should not enter into the merits of the case. It should shew that the master has made his *allocatur* (k). Affidavits used before the master on the taxation cannot be read on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; and notice that they will be used is not sufficient(l). The costs of a rule for reviewing the taxation are not given where the mistake is with the master(m). An application to review the taxation of costs on a bill of exceptions, or other proceeding in error, should be made in the court of error(n).

3. Remedies for Costs.

3. Remedy
for Costs.

The remedy for costs for which judgment has been obtained is by action or execution in the ordinary way. The remedy for costs payable by rule of court is by attachment, as to which see *post*, 1264, or by execution under the provisions of 1 & 2 V. c. 110, s. 18, as to which see *post*, 1196.

As to an attorney's remedy for costs against his client, see *ante*, Vol. I. 69 to 89.

(b) *Nokes v. Fraser*, 3 Dowl. 339; *Broggref v. Hawke*, 6 Dowl. 67; *Burchell v. Clark*, 9 Leg. Obs. 330.

(c) *Ivey v. Young*, 13 Leg. Obs. 381; 5 Dowl. 450, S. C.

(d) *Southwell v. Bird*, 7 Dowl. 557.

(e) *Hallen v. Smith*, 7 Dowl. 394; 5 M. & W. 159, S. C., *nom. Wallen v. Smith*.

(f) *Head v. Baldry*, 8 Ad. & El. 605.

(g) See *Rennie v. Mills*, 5 Bing. N. C. 249.

(h) *Daniel v. Bishop*, M'Clel. 61; 13 Price, 129, S. C.; *Williams v. Hunt*, 1 Chit. Rep. 321; *Aliven v. Furnival*, 2 Dowl. 49.

(i) *Aliven v. Furnival*, 2 Dowl. 49.

(k) *Cleaver v. Hargreave*, 2 Dowl. 689, Exch.

(l) *Cliffe v. Prosser*, 2 Dowl. 21.

(m) *Ward v. Bell*, 2 Dowl. 76.

(n) *Francis v. Doe d. Harvey*, 5 M. & W. 272.

As to setting off costs against costs, see *ante*, Vol. I. 457. CHAP. XXXI.
Where the defendant after judgment signed, in order to avoid execution, paid debt and costs in the action, insisting however, at the same time, that he had a right to set off the costs of a rule obtained by plaintiff, which had been discharged, but not making any formal demand, upon motion the court directed the plaintiff to refund the amount of those costs(o).

As to when security for costs may be compelled to be given, see *ante*, 1012.

(o) *Abernethy v. Paton*, 5 Bing. N. C. 276.

CHAPTER XXXII.

ENTRY OF SUGGESTIONS UPON THE ROLL.

BOOK IV.
PART I.

When necessary in general.

WHEREVER, by the provision of an act of parliament, or otherwise, a person not a party to the record is to be affected by a judgment, or where the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is, in some cases, to issue a *scire facias* against him, and in others, to enter a suggestion on the roll; so that the party to be affected by it may, in the former proceeding, appear and plead to it, and in the latter proceeding, that he may demur, if he thinks the facts suggested are insufficient in point of law, or to plead if he means to deny them (*a*). We shall proceed to notice in this Chapter the latter mode of proceeding in the following cases. As to the proceeding by *scire facias*, see *ante*, 815.

Suggestions as to the Awarding of the Venire, 1170.

————— *in Debt on Bond, 1171.*

————— *as to the Death of Parties, 1172.*

————— *for Costs, id.*

As to the awarding of the Venire.

As to the Awarding of the Venire.] If the sheriff be interested in the event of the cause, or related by blood or affinity to either of the parties, a suggestion to this effect may be entered on the issue, immediately before the award of the *venire*; and the *venire* is then awarded to the other sheriff, if there be two (*b*); or if there be but one, then to the coroner (*c*); or if the coroner be interested, &c., then to two persons appointed by the court, called *elizors* (*d*). Any matter may be thus suggested which would be a good principal challenge to the array of the jury (*e*).

In Local Actions to prevent Delay.

In local actions in the superior courts, by the 3 & 4 *W.* 4, c. 42, s. 22, after reciting, that “unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen;” it is enacted, “that in any action depending in any of the said superior courts, the venue in which is by law *local*, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the *issue* to be tried, or *writ of inquiry* to be executed, in *any other county* or place than that in which the venue is laid; and for that purpose, any such court or judge may order a *suggestion* to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place” (*f*). The application to a

(*a*) See *Bartlett v. Pentland*, 1 B. & Adol. 704.

(*b*) *Rex v. Warrington*, 1 Salk. 152:

Letson v. Beckley, 5 M. & Sel. 144.

(*c*) *Fortesc. de Laud. LL. c. 25: Co. Litt. 158.*

(*d*) *Id.: Holland v. Heron*, Barnes, 465. See forms of such suggestions, Chit. Forms, 635.

(*e*) See upon this subject, Vol. I. 305.

(*f*) See the forms, Chit. Forms, 636.

court or a judge for this purpose should be supported by an affidavit, shewing the unnecessary delay or expense that will take place by the trial or execution of the writ of inquiry in the county in which the action is brought.

CHAP. XXXII.

So, in local actions, where a fair and impartial trial cannot be had in the county where the venue is laid, the court, upon a proper case being stated to them by affidavit, will, upon motion, grant leave to enter such a suggestion upon the issue, with a *nient dedire*, in order to have a trial in the next adjoining county (*g*); and it seems to be immaterial whether the next adjoining county be a county palatine or not (*h*). The affidavits upon which such an application is founded, should specify the facts from which it is to be inferred that a fair trial cannot be had in the county where the venue is laid (*i*). In transitory actions, it is more usual to move for leave to change the venue (*j*).

Or to secure an impartial Trial.

Also, in actions transitory or local, depending in any of the courts at Westminster, where the venue is laid in the county of any city or town corporate in England, (with the exception of London, Westminster, Bristol, Chester, and the borough of Southwark), the court, upon the application of either party, may, if they think proper, award the *venue*, &c., to the sheriff of the county next adjoining to the county of such city or town corporate, in order that the action may be there tried (38 *G.* 3, c. 52, ss. 1, 10) (*k*); and it should seem that this would be the case, even although the venue has been changed to the city upon the usual affidavit (*l*).

Where Venue laid in County of City or Town Corporate, &c.

Where the venue is laid in Berwick-upon-Tweed, or other place where the queen's writ of *venire* does not run, then upon a suggestion that the issue ought to be tried in the next adjoining English county, the *venire* is awarded to the sheriff of such county accordingly (*m*); thus, where the venue is laid in Berwick-upon-Tweed, the *venire*, upon suggestion, may be awarded to the county of Northumberland (*n*); and the like (*o*).

Where Venue laid in Berwick-upon-Tweed.

The suggestion should always be made at the proper stage of the proceedings, when the fact which gave rise to the necessity for making the suggestion took place.

When made.

In all cases, where either party would suggest any special matter, as to the awarding of the *venire* out of the common course, a copy should be given to the opposite party, and he should be allowed a reasonable time to consider of it, before a *nient dedire* is entered (*p*).

Notice of the Suggestion should be given.

[Of Breaches in Debt on Bond.] As to the suggestion, &c., in this case, see *ante*, 723 to 729.

Of Breaches in Debt on Bond.

(*g*) *Rex v. Harris*, 3 Burr. 1333; 1 W. Bla. 379, S. C.: *Rex v. Amery*, 1 T. R. 363; *Rex v. Hunt*, 3 B. & Ald. 444.

(*h*) *Rex v. The Inhabitants of St. Mary*, 7 T. R. 735.

(*i*) *Rex v. Harris*, 3 Burr. 1333. See form of suggestion, and award of *venire* into the adjoining county, Chit. Forms, 637.

(*j*) See *ante*, 956.

(*k*) See *Rex v. Inhabitants of St. Mary*, 7 T. R. 735. See the form of the suggestion in such a case, and award of the *venire* into the adjoining county, Chit.

Forms, 637.

(*l*) *Bird v. Morse*, 7 Taunt. 385.

(*m*) See the former decisions as to when the venue was in Wales, *Goodright d. Richards v. Williams*, 2 M. & Sel. 270: and see *Ambrose v. Rees*, 11 East, 370: *Rex v. Cowle*, 2 Burr. 855.

(*n*) *Mayor of Berwick v. Ewart*, 2 W. Bl. 1036.

(*o*) See also *Way v. Yally*, 2 Salk. 651: and see form of suggestion and award of *venire*, Chit. Forms, 103.

(*p*) *Brocas v. London, City of*, 1 Str. 235.

BOOK IV.
PART I.Of the Death
of Parties.
Before final
Judgment.Amendment
of Omission
to enter it.After final
Judgment.Death of De-
fendant in
Error.

For Costs.

Where De-
fendant en-
titled to more
than usual
Costs.

Of the Death of Parties.] Where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to or against the survivors(*q*), the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of or against the survivors(*r*). The death, in this case, if it occur before issue joined, is suggested at the commencement of the next pleading, and of course appears upon the face of the issue when made up. But if it happen after issue joined, it seems, according to one case, that it is not necessary that it should be suggested upon the *Nisi Prius* record; and that if it be suggested upon the issue roll, it will be sufficient(*s*). But, according to a more recent decision at *Nisi Prius*, it would seem that it should be suggested on the *Nisi Prius* record(*t*). And inasmuch as there is now no distinct issue roll(*u*), it would seem that the suggestion should be made on the *Nisi Prius* record. Even after motion to set aside proceedings for irregularity, because one of two plaintiffs died before interlocutory judgment, and the suit proceeded to execution in the names of both, the court allowed the surviving plaintiff to suggest the death of the other on the roll, and to amend the *ca. sa.* without payment of costs(*x*).

If the death happen after final judgment, then, upon suggesting the death upon the roll, you may sue out execution by or against the survivor(*y*); or you may sue out execution in the names of all, but it can be executed as against the survivor only(*z*). The lands, however, of a deceased defendant are still liable in satisfaction of the judgment, although he leave others of the defendants surviving him; for the judgment survives as to the personalty only, and not as to the realty (*Vol. I.* 444); and therefore, if the plaintiff wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter(*a*).

If one of several defendants in error die, upon suggesting the death upon the roll, you may proceed against the survivors(*b*).

For Costs.] Where the effect of an act of parliament is to alter the law in respect of giving costs to a defendant in a case where the plaintiff, in ordinary circumstances, would be entitled to them, the proper course is to enter a suggestion on the roll of the facts necessary to entitle the defendant to those costs; so that the plaintiff may demur, if the defendant do not set forth the facts which bring the case within the act of parliament, or may traverse those facts if they be untrue(*c*). If

(q) See *Checchi v. Powell*, 6 B. & C. 253.

(r) 8 & 9 W. 3, c. 11, s. 7.

(s) *Farr v. Denn*, 1 Burr. 363.(t) *Rex v. Cohen*, 1 Stark. 511.(u) See *Hodges v. Diley*, 7 Dowl. 444.(x) *Newnham v. Law*, 5 T. R. 577. See forms of suggestions of death, before issue joined, Chit. Forms, 638; after issue joined, Id. 639.(y) *Withers v. Harris*, 2 Ld. Raym.808; and see *Pennoir v. Brace*, 1 Salk. 319; 1 Show. 404; 1 Ld. Raym. 244, S. C.

(z) 2 Saund. 50 k, 72 k, o: ante, 819.

(a) Ante, 820.

(b) Vol. I. 355. See a form of the suggestion, Lill. Ent. 217.

(c) *Hickman v. Colley*, 2 Str. 1120; *Bartland v. Pentland*, 1 B. & Adol. 710. In *Rawson v. Dundas*, 3 Bing. N. C. 160;

the act of parliament be repealed pending the suit, it seems that the costs must be awarded as if the act had never existed, unless there be some express saving in the repealing act(*d*).

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If a defendant be entitled to double or treble costs on a verdict for him, because sued for something done by virtue of his office of justice of peace, constable, officer of excise or customs, &c., (*see ante*, 913, 914), if it do not appear upon the face of the record that the action was brought against him as such officer, for something done by him in the execution of his duty, then, upon obtaining a certificate to that effect from the judge, at or after the trial(*e*), or, in case of a nonsuit or *non-pros*, upon his making an affidavit of the fact, the court will allow him to enter a suggestion(*f*) of it upon the record(*g*). And the same in all other cases where the defendant is entitled to double or treble costs(*h*). But unless the statute require it, it does not seem absolutely requisite that this suggestion should be entered(*i*); if it otherwise appear on the face of the record that the case is within the statute.

Double or Treble Costs.

If an action be brought in one of the courts at Westminster for a cause of action which might have been sued for in the court of requests or court of conscience of any city, borough, or town, there is usually a clause in the statute creating the jurisdiction of the inferior court, by which it is provided, that if the plaintiff in the superior court recover any sum within the limits of the cognizance of the inferior court, he shall not be entitled to costs; or, if the defendant have a verdict, he shall be entitled to double costs(*k*). We shall not attempt, in a work of this description, to enumerate the provisions of this nature in all the statutes which establish courts of conscience; all that is here intended is, to state some general principles which the courts seem to have established upon the subject, and which are applicable to all these courts of conscience, unless expressly controlled by the words of the statute creating their jurisdiction, or by necessary implication. All these statutes have one common object, and should all, as far as possible, receive a uniform construction(*l*).

Under Court of Conscience Acts.

The courts of conscience are, in general, restrained to debts or other demands certain, capable of being ascertained by mere computation(*m*). Consequently, in all other cases,—as, for in-

To what Cases Court of Conscience Acts in general extend.

5 Dowl. 207, *S. C.*, the court refused to allow to be entered on the roll a suggestion of the grounds of their judgment disclosed on a motion to enter up judgment on the certificate of the Speaker of the House of Commons, under the 9 Geo. 4, c. 22, s. 63, for costs incurred in the prosecution of a petition in parliament.

(*d*) *Warne v. Beeresford*, 6 Dowl. 157; *Charrington v. Meatheringham*, 5 Dowl. 464.

(*e*) *Harper v. Carr*, 7 T. R. 448; 1 Doug. 307, 308, n., *S. C.*; *Devenish v. Mertins*, 2 Str. 974; and see *Atkins v. Banwell*, 3 East, 92.

(*f*) See a form of rule, Chit. Forms, 644.

(*g*) *Barton v. Miles*, Hardw. 125; *Ca. Pr. C. B.* 16.

(*h*) See *Collins v. Poney*, 9 East, 322; *Bate v. Hodgetts*, 1 Bing. 182; *Wells v. Ody*, 3 Dowl. 799; 2 C., M. & R. 185,

S. C.

(*i*) See *Wells v. Ody*, 3 Dowl. 799; 2 C., M. & R. 128, *S. C.* It was a case on the Building Act. (*Sed vide* Tidd, 9th ed. 988).

(*k*) See the forms of suggestions, &c., Chit. Forms, 643.

(*l*) *Shadduk v. Bennett*, 7 D. & R. 232.

(*m*) *Jonas v. Greening*, 5 T. R. 529; *Fornin v. Oswell*, 1 M. & Sel. 393; see *Foot v. Coare*, 2 B. & P. 588; *Parker v. Vaughan*, Id. 29; *Sandby v. Miller*, 5 East, 194; *Rez v. Commissioners of London Court of Requests*, 7 East, 292; *Holden v. Newman*, 13 East, 161; *M^cCobham v. Carr*, 1 B. & P. 223; 1 Doug. 245. An action for use and occupation of furnished lodgings is within the 39 & 40 Geo. 3, c. 104, s. 13. (*Kidd v. Mason*, 3 Dowl. 96; and see *Drew v. Fletcher*, 1 B. & C. 233).

BOOK IV.
PART I.

stance, in an action on the case for negligence in driving a carriage(*n*), or in a special action of *assumpsit* for the breach of an agreement(*o*), or the like,—the defendant cannot plead the statute, nor will the court allow him to enter a suggestion upon the record, however trifling the damages may be(*p*). It is in general necessary, also, in order to sue in these courts of conscience, that the cause of action have arisen, and the defendant or plaintiff, or both, reside within the jurisdiction(*q*); but this depends entirely upon the wording of the statute in each particular case, and sometimes it may be otherwise(*r*). It would seem, that where the act of parliament makes no express provision as to the residence of the parties, as a general rule the plaintiff need not, but the defendant must, be resident within the jurisdiction(*s*). It is the amount of debt or damages found by the jury, and not as laid in the declaration, which is to determine whether it might have been sued for in the inferior court or not(*t*). And the fact of the cause being tried on a writ of trial does not affect the question(*u*). And although reduced below the limited sum by a payment in part(*x*), or, it seems, by payment into court(*y*), or by the plea of the Statute of Limitations(*z*), or by the plea of infancy, or other defence set up to the action(*a*), it is, in general, within the statute. But otherwise if reduced by a set-off(*b*), or tender(*c*), if pleaded. Merely pleading a tender, however, does not preclude the defendant from the benefit of the statute, when the *original* debt is under the limited

(*n*) *Lawson v. Moggridge*, 1 Taunt. 396; see *Melton v. Garment*, 2 N. R. 84; *Fost v. Coare*, 2 B. & P. 598.

(*o*) *Jonas v. Greening*, 5 T. R. 529; see *Fornin v. Oswell*, 1 M. & Sel. 393.

(*p*) See *Drew v. Fletcher*, 1 B. & C. 283.

(*q*) *Welsh v. Troyte*, 2 H. Bl. 29; *Tubb v. Woodward*, 6 T. R. 175; *Smith v. O'Kelly*, 1 B. & P. 76; *Dillamore v. Caplan*, 1 Bing. 388; 8 Moore, 429, S. C.; *Bailey v. Chitty*, 5 Dowl. 307; 2 M. & W. 28, S. C.

(*r*) See *Busby v. Fearon*, 8 T. R. 235; *Barney v. Tubb*, 2 H. Bla. 352; *Jonas v. Greening*, 5 T. R. 529; *Re v. Danser*, 6 T. R. 242; *Harwood v. Lester*, 3 B. & P. 617; *Baldon v. Pitter*, 3 B. & Ald. 210; *Reeres v. Stroud*, 1 Dowl. 399. Under the Middlesex Court of Requests Act, the plaintiff need not be resident within the jurisdiction (*Pritchard v. M'Gill*, 2 M. & W. 380); but the defendant must, and the cause of action must have arisen within it. (*Wells v. Langridge*, 5 Dowl. 509; *Francis v. Ball*, B. C., M. 1839; 3 J. 1077). But it seems that the affidavit in support of the application for a suggestion need not state that it arose within the jurisdiction, it rests with the plaintiff to shew this. (*Bishop v. Marsh*, C. P., M. 1839; 3 Jurist, 1000). As to what is seeking a livelihood, &c., within the meaning of the London Court of Conscience Act, see *Double v. Gibbs*, 1 Dowl. 583; 1 C. & M. 246, S. C., and cases there cited: *Rice v. Legh*, 2 Id. 105. Under the Gravesend Court of Requests Act, the plaintiff will not be deprived of costs, though the defendant reside within the jurisdiction of that court, if the cause of action accrued elsewhere. (*Gray v. Soames*, M. 1838; *Bail Court*, Q. B., *Coleridge*, J., 2 Jurist, 1040).

(*s*) See *Pritchard v. M'Gill*, 2 M. & W.

380.

(*t*) *Cross v. Collins*, 5 Bing. N. C. 194; *Barnes v. Winkler*, 2 C. & P. 345; *Buddley v. Oliver*, 1 Dowl. 598, and cases there cited in notes; 1 C. & M. 219, S. C.; *Moore v. Jones*, 2 Dowl. 38; *Younger v. Wilsby*, 6 Taunt. 542; *Weston v. Donnelly*, Say. 273; *Drew v. Coles*, 1 Dowl. 580; *Baldon v. Pitter*, 3 B. & Ald. 210; *Braham v. Broune*, 2 C. & J. 327; and see *Shaddick v. Bennett*, 7 D. & R. 229; 4 B. & C. 769, S. C.

(*u*) *Wells v. Langridge*, 5 Dowl. 509; *Turner v. Barnard*, 5 Dowl. 170.

(*x*) *Walker v. Watson*, 8 Bing. 414; 1 Moo. & Sc. 674, S. C.; *Clark v. Askew*, 8 East, 28; *Horn v. Hughes*, Id. 347; *Fountain v. Young*, 1 Taunt. 60; see *Porter v. Philpot*, 14 East, 344; *M'Collam v. Carr*, 1 B. & P. 223; *Harsant v. Larkin*, 3 B. & B. 257; 7 Moore, 63, S. C.; *Abbey v. Lill*, 5 Bing. 299; 2 Moo. & P. 534, S. C.

(*y*) *Turner v. Barnard*, 5 Dowl. 170; 1 H. & W. 580, S. C.; vide *Farrent v. Morgan*, 3 Dowl. 792; ante, 978.

(*z*) *Lord Huntingtower v. Heely*, 7 D. & R. 369; *Rotheray v. Munnings*, 1 B. & Adol. 18 a.

(*a*) *Bateman v. Smith*, 14 East, 301.

(*b*) *Pitts v. Carpenter*, 2 Str. 1191; *Gross v. Fisher*, 3 Wils. 48; *Jenkinson v. Morton*, 1 M. & W. 300; 1 T. & G. 676; 5 Dowl. 74, S. C., which was on a trial before the sheriff. And see *Gobed v. Birt*, 2 Chit. 394; *Cottle v. Langman*, 9 Moore, 625; *Bailey v. Chitty*, 2 M. & Wels. 28; 5 Dowl. 307, S. C.; *Jones v. Harris*, 1 Dowl. 374. *Aliter*, if the set-off be not pleaded. (*Id.*)

(*c*) *Heaward v. Hopkins*, 2 Doug. 448; *Waistell v. Atkinson*, 3 Bing. 269; 11 Moore, 14, S. C.; *Downes v. Ray*, 1 H. & W. 649.

amount (*d*). Sometimes the act expressly excepts a demand originally exceeding the limited amount: and where a verdict was given for 2*l.* 8*s.* 6*d.* for goods sold, after deducting 4*l.* 19*s.* 6*d.* for tuition and money payments; it was held, that the claim was a balance of an account on a demand originally exceeding 5*l.* within the 47 *G.* 3, s. 1, c. 4 (Blackheath Act); therefore no suggestion to deprive the plaintiff of costs could be entered (*e*). But it has been held, under the 6 & 7 *W.* 4, c. 120, s. 22, (new Blackheath Act), which excepts a debt for "any sum being the balance of an account originally exceeding 5*l.*," that the jurisdiction extends to cases where the debtor side of the account amounts to above 5*l.*, and the balance has been reduced by occasional payments below that sum, if it appear that so much as 5*l.* was not at any time due (*f*).

Executors and administrators, as defendants, are not in general within any of these statutes (*g*); but as plaintiffs they are (*h*); nor are attornies, either as plaintiffs or defendants, unless specially named therein (*ante*, 847). But assignees of a bankrupt are (*i*); so are barristers (*k*).

How Court of Conscience Acts must be taken advantage of.

Where the statute prescribes a particular mode of proceeding, to enable the defendant to avail himself of it, he must follow that mode, and the court will not permit him to follow any other (*l*). If the statute creating the court of conscience contain a *prohibitory clause*, declaring that no action shall be brought elsewhere for the causes of action therein mentioned, the statute in such a case may be offered as a defence, pleading it specially; and though the statute gives no form of plea, yet it may be pleaded (*m*). Therefore, if the statute gives the defendant leave to plead the matter specially, as the means of taking advantage of it, if he omit to plead it, he will lose the benefit of the statute. Thus, where the act provided that in cases within the jurisdiction of the court of requests, where, upon the trial, the debt, &c., should be found not to amount to 40*s.*, no judgment should be entered on the verdict, and if it were entered should be void, and the defendant should have costs; it was held, that the defendant could not take advantage of the act, by suggestion on the roll, but was bound to plead it in bar (*n*). Such plea, however, will be bad *non obstante veredicto*, if the statute be repealed in the course of the suit (*o*). On the other hand, where the statute contains no such *prohibitory clause*, it cannot be pleaded; the mode of taking advantage of it in that case is, by the defendant's

(*d*) *Jordan v. Strong*, 5 M. & Sel. 196.

(*e*) *Moreau v. Hicks*, 1 Harr. & W. 87; and see *Green v. Bolton*, 4 Bing. N. C. 308; 6 Dowl. 436, S. C. (decided on the Tower Hamlets Court of Requests Act); and *Fountain v. Young*, 1 Taunt. 60 (decided on the then Southwark Court of Requests Act).

(*f*) *Pope v. Banyard*, 6 Dowl. 571.

(*g*) *Aitway v. Burrows*, 1 Doug. 263; see *Wase v. Wyburd*, Id. 246: *Webb v. Brown*, 5 T. R. 535.

(*h*) *Wase v. Wyburd*, 1 Doug. 246: *Bishop v. Marsh*, C. P., M. 1839; 3 Jurist, 1000.

(*i*) *Keay v. Rigg*, 1 B. & P. 11: *Ward v. Abrahams*, 1 B. & Ald. 367.

(*k*) *Wettenhall v. Wakefield*, 10 Bing. 385; 3 Moo. & Sc. 805; 2 Dowl. 759, S. C.

(*l*) *Taylor v. Blair*, 3 T. R. 452; 1 East, 352, S. C.; and see *Ansee v. Liley*, 1 M. & Ry. 564: *Clark v. Hamlet*, 1 H. & W. 177: *West v. Turner*, 1 Nev. & P. 617.

(*m*) *Parker v. Elding*, 1 East, 352: *Barnes v. Tubbs*, 2 H. Bl. 350: *Jackman v. Cother*, 5 M. & W. 147; Tidd, 9th ed. 960. It seems that the plea need not be to the jurisdiction of the court. (See *West v. Turner*, per Denman, C. J., 1 Nev. & P. 617: see the principle in *Moore v. Dent*, 1 M. & Rob. 462: *Defries v. Snell* 4 Dowl. 680).

(*n*) *Jackman v. Cother*, 5 M. & W. 147.

(*o*) *Warne v. Beresford*, 6 Dowl. 157.

BOOK IV.
PART I.

moving, after verdict, or execution of writ of inquiry in case of a judgment by default, and before final judgment(*p*), (upon affidavit stating his residence within the inferior jurisdiction at the time of the commencement of the action, and that he is liable to be warned or summoned to the inferior court, together with such other circumstances as may be necessary to bring him within the statute), for leave to enter a suggestion to that effect upon the record(*q*). Or, where the statute merely disentitles the plaintiff to costs in general terms, without directing any particular mode of proceeding by plea or suggestion, he may move the court to stay the proceedings, upon payment of the sum recovered, without costs(*r*). Though the plaintiff, by his indorsement on the writ, claims an amount recoverable in a court of requests, still the court will not, it seems, on payment of the sum, relieve the defendant from costs before trial, but will leave him to apply to enter a suggestion, or plead the act, as the case may be(*s*). The application to enter the suggestion must not be made *before*(*t*) verdict, but must be promptly after it, or after the execution of the writ of inquiry, in case of a judgment by default; it is too late to make it in the term after judgment signed and execution levied, if it could have been made in that term(*u*). Where a judge at the assizes, in pursuance of the 1 W. 4, c. 7, (*ante*, Vol. I. 331), orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered and execution issued, the defendant is not precluded from applying in the first four days of the next term to the court above to enter the suggestion; but a judge at the assizes has no power to order the entry(*x*). So, the defendant is not precluded from applying to have the suggestion entered, though the cause was tried before the sheriff with the defendant's consent, and though costs have been taxed, final judgment signed, and execution issued(*y*). And in such a case it is not necessary that there should be a previous order to stay the proceedings(*z*). So, where judgment by default is signed in vacation and execution issued, the defendant may, nevertheless, apply to the court in the following term to have such suggestion entered on the terms of his paying the plaintiff's costs since the judgment(*a*); which terms would, it seems, be imposed in other similar cases: and the only mode of avoiding them is, before they are incurred, to obtain a judge's order to stay the proceedings till the next term.

Where Defendant has been held to Bail for too much, 43 G. 3, c. 46, s. 3.

Lastly, where the plaintiff *does not recover the amount for which he has holden the defendant to bail*, the defendant shall be entitled to costs, if, upon motion for that purpose, and upon

(*p*) *Calvert v. Everard*, 5 M. & Sel. 510: *Unwin v. King*, 2 Dowl. 593; 2 H. Bl. 352.

(*q*) *Barney v. Tubbs*, 2 H. Bl. 352: *Fitzpatrick v. Pickering*, 2 Wils. 68: *Watchorn v. Cook*, 2 M. & Sel. 348: see *Harris v. Lloyd*, 4 M. & Sel. 171: *Swinglehurst v. Altham*, 3 T. R. 139: *Sandall v. Bennett*, 3 Dowl. 294.

(*r*) *Drumster v. Day*, 8 East, 239: *Cornforth v. Lowcock*, 1 M. & R. 321: and see *Baldon v. Pitter*, 3 B. & Ald. 210; 1 Chit. Rep. 636, notes.

(*s*) *King v. Myers*, 5 Dowl. 687.

(*t*) *Meredith v. Drew*, 8 Bing. 142; 1

Moo. & Sc. 225; 1 Dowl. 252, S. C.

(*u*) *Watchorn v. Cook*, 2 M. & Sel. 348: and see *Hippesley v. Layng*, 4 B. & C. 863; 7 D. & R. 265 S. C.

(*x*) *Baddley v. Oliver*, 1 Dowl. 598; 1 C. & M. 219, S. C.

(*y*) *Bond v. Bailey*, 3 Dowl. 808; 2 C., M. & R. 246, S. C.: and see *Godson v. Lloyd*, 4 Dowl. 157: *Shaw v. Oates*, Id. 720: *Kidd v. Mason*, 3 Dowl. 85: *Croad v. Harris*, 4 Dowl. 616; 1 H. & W. 657, S. C.: *Bernard v. Burner*, 1 M. & W. 580; 5 Dowl. 170, S. C.

(*z*) *Johnson v. Veal*, 7 Dowl. 487.

(*a*) *Heale v. Earle*, 2 M. & Wels. 383.

hearing the parties by affidavit, it shall appear to the court that there was no reasonable or probable cause for holding the defendant to bail for that amount (b). CHAP. XXXII.

The motion for leave to enter the suggestion, is for a rule to shew cause why the plaintiff should not bring the postea into court and carry in the roll, so that the defendant may enter a suggestion thereon, and that all proceedings be stayed in the meantime. Deliver a brief motion paper to counsel, accompanied with the affidavit (c). The affidavit must clearly bring the case within the act (d), and, in general, should expressly state that the defendant was liable to be summoned to the court of requests (e). And where the act applies to defendant's residing within the jurisdiction, the affidavit ought to shew that the defendant was residing there at the time of action brought (f). And where the act requires it, it should state that the cause of action arose within the jurisdiction. But, in a case under the Middlesex Court of Requests Act, the Court of Common Pleas held that the affidavit was sufficient without this statement, and that it rested on the plaintiff to make out the contrary, if he could (g). The copy of the writ of summons, annexed to, and referred to by, the affidavit, and indorsed for £4. 2s. 5d. debt, is sufficient evidence of the action being for a debt not exceeding £5 (h). The record need not, it seems, be produced in court, for the purpose of making the application (i). On the rule nisi being obtained, draw it up with one of the masters, and serve a copy upon the plaintiff's attorney or agent, at the same time shewing him the original; and then proceed to make the rule absolute upon affidavit of service. As soon as it is made absolute, get the suggestion drawn by counsel or pleader (k): indorse it upon the Nisi Prius record, and get one of the masters to enter it upon the roll. If the statute give the defendant costs, give notice to the plaintiff's attorney of the time of taxing them; bespeak the roll of the masters, and attend before one of them with the postea, who will thereupon tax the costs, and mark them upon the postea and roll. If the roll has not been carried in, and the plaintiff refuses to carry it in, then apply to the court by motion, or to a judge on summons, to compel him to deliver it up to you, in order to enable you to enter the suggestion thereon. It affords no answer to such an application, that the plaintiff's attorney has absconded with it, or the like (l). This suggestion may be traversed or demurred to by the plaintiff (m).

The Motion
&c. by Defen-
dant to enter
Suggestion
for Costs.

(b) 43 G. 3, c. 46, s. 3. See this statute, ante, 1148, and see the cases there cited. See the form of suggestion, Chit. Forms, 644.

(c) See form of affidavit and rules, Chit. Forms, 641, 642.

(d) *Newton v. Peacock*, 1 Dowl. 677.

(e) *Unwin v. King*, 2 Dowl. 492: *Fossett v. Godfrey*, Id. 587.

(f) *Moreau v. Hicks*, 1 Harr. & W. 87: see *Bond v. Bailey*, 3 Dowl. 808. As to what affidavit of this fact is sufficient,

see *Burton v. Campbell*, 6 Dowl. 451.

(g) *Bishop v. Marsh*, C. P., M. 1839; 3 Jurist, 1000.

(h) *Burton v. Campbell*, 6 Dowl. 451.

(i) *Kidd v. Mason*, 3 Dowl. 85.

(k) See form, Chit. Forms, 641 to 645.

(l) See *Jones v. Harris*, 1 Dowl. 433.

(m) *Jeffries v. Watts*, 1 New Rep. 157: *Hickman v. Colley*, Andr. 380. *Barney v. Tubb*, 2 H. Bl. 354: and see *Hickman v. Colley*, 2 Str. 1120: *Bartlett v. Pentland*, 1 B. & Adol. 710.

CHAPTER XXXIII.

DEATH, BANKRUPTCY, &c., OF PARTIES.

*What Actions survive to or against
Executors or Administrators,*
1178.

*Death before Verdict or Judgment
by Default,* 1180.

*Death after Verdict and before
Final Judgment,* 1181.

*Death between Interlocutory and
Final Judgment,* id.

Death after Final Judgment,

1182.

Death after Execution, 1182.

Death after a Writ of Error,
id.

*Death of Defendant, how far a
Discharge of his Bail,*
1182

Bankruptcy of Parties, 1183.

*Marriage of Feme Plaintiff or
Defendant,* id.

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What Actions
survive to or
against Exe-
cutors or Ad-
ministrators.

Where Exe-
cutors may
sue or be sued
for Injuries
to Persons, or
personal Pro-
perty.

*What Actions survive to or against Executors or Adminis-
trators.*] BEFORE we consider the effect the death of a
party has upon a suit, it will be necessary to ascertain what
actions survive to or against their executors or administrators.

Actio personalis moritur cum personâ, is a rule that admits
of many exceptions (*a*). All such personal actions as are
founded upon any obligation, contract, debt, covenant, or any
other duty to be performed, survive, and do not die with the
person, but may, by the common law, be brought by or against
the personal representatives of the deceased parties (*b*). One
species of contract, however, is within the rule above men-
tioned, *viz.* a promise of marriage, an action for the breach of
which cannot be maintained by an executor or administrator,
except, perhaps, where a special damage to the personal estate
of the deceased has been caused by its breach (*c*). Account
did not lie at common law for or against an executor, &c.; but
it is given to executors by stat. *Westm. 2nd*, (13 Ed. 1), st. 1, c.
23; and against executors by the 4 & 5 A. c. 16, s. 27. So, debt
on simple contract did not lie against an executor (*d*); unless
on a contract made by him in his representative capacity (*e*);
but debt for rent, and *assumpsit* upon the simple contract of
the testator, always did (*f*). And now, by the recent act, 3 &
4 W. 4, c. 42, s. 14, "an action of debt on simple contract
shall be maintainable in any court of common law against any
executor or administrator." An executor may support debt
for not setting out tithes (*g*). So, replevin or detinue will lie
for or against executors, where the goods taken away continue
still in specie in the hands of the wrong-doer, or of his ex-
ecutor (*h*); or, if they be consumed, then, an action for money

(a) See 1 Chit. Pl. 5th ed. 68, 89.

(b) *Mason v. Dixon*, Latch. 168: *Per-
kinson v. Gifford*, Cro. Car. 540: *Hamblly
v. Trott*, Cowp. 375.

(c) *Chamberlain v. Williamson*, 2 M. &
Sel. 416.

(d) Co. 87: *Hamblly v. Trott*, Cowp.
375.

(e) *Riddell v. Sutton*, 2 Moo. & P. 345;
5 Bing. 200, S. C.

(f) 9 C. 17 b: *Norwood v. Read*, Plowd.
180.

(g) *Holl v. Bradford*, 1 Sid. 88; 2 Eagle,
307.

(h) *Le Mason v. Dixon*, W. Jon. 173.

had and received, to recover the value (*i*). So, where the goods of a testator have been carried away in his lifetime, the executor may afterwards maintain trespass against the wrongdoers (4 *Ed.* 3, c. 7); and the same as to administrators, (31 *Ed.* 3, c. 11), and executors of executors (*k*). These statutes are construed as giving the same remedies to executors, &c., for injuries to the *personal* estate that the deceased might have had (*l*); so that they may have trespass or trover (*m*), action for a false return (*n*), action for an escape (*o*), action for removing goods taken in execution before the landlord (the testator) was paid a year's rent (*p*), action against an attorney for negligence (*q*), or any other action of the like kind, for injuries done to the personal estate of the testator in his lifetime (*r*). But these statutes do not extend to injuries done to the *person* of the testator; and therefore an executor shall not have an action for assault and battery, false imprisonment, or slander, or other actions of the like kind (*s*). Nor can an executor be sued, where the cause of action is founded upon a tort to the *person* where the plea must be "not guilty;" such as false imprisonment, assault and battery, and slander (*t*).

The above statutes of 4 *Ed.* 3, c. 7 and 31 *Ed.* 3, c. 11, and 25 *Ed.* 3, c. 5, did not extend to injuries done to the *freehold* of the testator, and, therefore, an executor could not sue for diverting a watercourse, obstructing lights, cutting trees, or other actions of the like kind (*u*). And an executor could not be sued where the cause of action was founded upon any malfeasance or nonfeasance, or where it was a tort, or arose *ex delicto*; such as trespass for taking goods, &c., trover, deceit, escape, and many other cases of the like kind, where the declaration imputes a tort done to the person or property of the plaintiff by the deceased, and the plea must have been "not guilty" (*v*). Yet, if the plaintiff's goods were taken away by the testator, and still continued in specie in the hands of the executor, replevin or detinue would always, as it still will, lie against the executor (*y*); or, if they be consumed, then, an action for money had and received, to recover the value (*z*). And now, by the 3 & 4 *W.* 4, c. 42, s. 2, reciting, that "there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy thereof," it is enacted, "that an action of trespass, or trespass on the case,

When Executors may sue or be sued for Injuries to real Property.

(i) *Hambly v. Trott*, Cowp. 377.

(k) 25 *Ed.* 3, c. 5.

(l) *Mason v. Dixon*, Latch. 169.

(m) 5 Co. 27 a: *Le Mason v. Dixon*, W. Jon. 174.

(n) *Williams v. Cary*, 4 Mod. 403.

(o) *Berwick v. Andrews*, 2 Ld. Raym. 973.

(p) *Pulgrave v. Wyndham*, 1 Str. 212.

(q) *Knight v. Quarles*, 2 B. & B. 103; 4 Moore, 232, S. C.

(r) See also *Rutland v. Rutland*, Cro. El. 377: *Emerson v. Emerson*, 1 Vent. 187: *Le Mason v. Dixon*, W. Jon. 174:

Berwick v. Andrews, 2 Ld. Raym. 974.

(s) *Le Mason v. Dixon*, W. Jon. 174: *Mason v. Dixon*, Latch. 168: *Emerson v. Emerson*, 1 Vent. 187. As to when the

breach of contract was an injury to the person, &c., see *Chamberlain v. Williamson*, 2 C., M. & R. 597; 2 Will's Exors., 2nd ed. 567.

(t) *Le Mason v. Dixon*, W. Jon. 174: *Mason v. Dixon*, Latch. 167, 168: *Hole v. Bradford*, Ld. Raym. 57: *Carter v. Fossatt*, Palm. 330: *Perkinson v. Gilford*, Cro. Car. 540: *Kinsey v. Heyward*, 1 Ld. Raym. 433: *Hambly v. Trott*, Cowp. 375.

(u) *Le Mason v. Dixon*, W. Jon. 174: *Mason v. Dixon*, Latch. 168: *Emerson v. Emerson*, 1 Vent. 187.

(v) See the cases cited in note (r), *supra*.

(y) *Le Mason v. Dixon*, W. Jon. 173, 174:

(z) *Hambly v. Trott*, Cowp. 377.

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as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person: and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." It will be observed, that this enactment has some limitations, and does not extend to injuries to the *person*. Although the statute expressly gives an action in form *ex delicto*, yet, where an action *ex contractu* would lie before the statute, it may still be brought. Therefore, where the testator had wrongfully taken coal from the plaintiff's land, and sold it, and received the proceeds, though no direct evidence was given of the sum received, but merely of the fact of the sale, it was held, that the plaintiff might bring money had and received, for so much as was raised before the six months, and trespass under the above act, for so much as was raised within the six months (*a*). If an action be brought by a termor upon the 7 & 8 G. 4, c. 31, for an injury done to his house, within three calendar months from the offence committed, and that action abates by the death of the termor, after the three months have expired, his executor cannot, it seems, bring a fresh action (*b*). And it is a matter of doubt, whether an executor of a termor can, in any case, bring an action upon that statute for an injury sustained in the lifetime of his testator (*c*).

Death before
Verdict or
Judgment by
Default.

Death before Verdict or Judgment by Default.] If a sole plaintiff or defendant die before verdict or judgment by default, the action abates, and the plaintiff or his executor is obliged to commence a new action against the defendant or his executor, provided the cause of action survive to or against the executor (*d*). But where a person admitted to defend alone as landlord in ejectment died before trial, having devised all his real estates to J. S., and the Statute of Limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the court, upon application, gave the lessor of the plaintiff leave

(*a*) *Powell v. Rees*, 2 Nev. & P. 571; 7 Ad. & E. 426, S. C.

(*b*) *Adam v. Inhabitants of Bristol*, 4 Nev. & M. 144; 2 Ad. & Ell. 389, S. C.

(*c*) See 1 Williams on Executors, 2nd ed. 565.

(*d*) See *Cutfield v. Coney*, 2 Wils. 83; *Wallop v. Irwin*, 1 Wils. 315; *Taylor v. Harris*, 3 B. & P. 549. As to when the death takes place during the assizes or sittings, see *ante*, 822.

to sign judgment against the casual ejector in the old suit, unless J. S. would appear and defend the action as landlord (*d*). Where a sole plaintiff dies pending the action, it seems the proper course for the defendant to take, if the action be continued, is by plea in abatement or writ of error, according to the stage of the cause. The Court of Exchequer refused to arrest the judgment or to stay the *postea* in the hands of the associate, though circumstances were brought before them shewing a strong probability of the plaintiff's having died before the trial (*e*).

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Where there are several plaintiffs or defendants, and some of them die, if the cause of action survive to or against the others, the action does not abate; but the death being suggested upon the roll, the action proceeds by or against the survivors (*f*). But in an action by husband and wife for money lent by the wife before marriage, the death of the wife before trial was holden to abate the suit (*g*).

Of one of several.

Death after Verdict and before Final Judgment.] If a sole plaintiff or defendant die after verdict, or even after the assizes begin, or after the first day of the sittings, though before the trial, and before final judgment, the action is not thereby abated; but final judgment is signed within two terms, as if the party were alive, and then revived by *scire facias* by or against the executor, &c. (*h*). See fully as to where and how the judgment in this case must be entered, &c., *ante*, 821, 822. The action would not, in this case, be abated, although it were for a cause of action, as for a libel, &c., which could not be originally brought by an executor (*i*).

Death after Verdict and before final Judgment. Of a sole Plaintiff or Defendant.

So, if one of several plaintiffs or defendants die after verdict and before judgment, the action does not abate; but the death being suggested on the roll (*k*), judgment is entered by or against the survivors, and execution sued out accordingly (*l*).

Of one of several.

Although the plaintiff has died after verdict, the court may, it seems, grant a new trial on the application of the defendant, and would in such case impose terms on him to prevent his taking advantage of the plaintiff's death (*m*).

New Trial after.

Death between Interlocutory and Final Judgment.] If a sole plaintiff or defendant die after judgment by default, and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executors (*n*); but the judgment may be revived by *scire facias*, and the parties may thereupon proceed to final judgment (*o*). The court, in such a case, before the recent rule of *H. T.*, 4 *W.* 4, r. 2, (*ante*, Vol. I. 341), referred it to the master to compute principal and interest on a bill of exchange, during the same term in which the plaintiff died, without a *scire facias*; because the

Death between Interlocutory and Final Judgment. Of sole Plaintiff or Defendant.

(*d*) *Doe Grubb v. Grubb*, 5 B. & C. 457.

(*e*) *Johnson v. Hamilton*, 4 Dowl. 762.

(*f*) *Ante*, 1171, 1172.

(*g*) *Checchi v. Powell*, 6 B. & C. 253.

(*h*) 17 Car. 2, c. 8: *ante*, 821, 822.

(*i*) *Palmer v. Cohen*, 2 B. & Adol. 966: see *Copley v. Day*, 4 Taunt. 702: *Toulmin v. Anderson*, 1 Id. 385: *Toussaint v.*

Hartop, 1 Moore, 287; 7 Taunt. 571, S. C.

(*k*) See forms of suggestions, Chit. Forms, 638, 639.

(*l*) *Ante*, 823.

(*m*) *Griffiths v. Williams*, 1 C. & J. 47.

(*n*) See *Ireland v. Chamneys*, 4 Taunt. 884, 858: *Wallop v. Jewin*, 1 Wils. 315.

(*o*) *Ante*, 823.

BOOK IV.
PART I.

final judgment would be signed as of the same term, and, having relation to the first day of it, would appear to have been signed before the plaintiff's death (*p*) ; but since that rule, as judgments have not relation to the first day of the term, but only to the day on which they are actually signed, this would not be permitted.

Of one of
several.

So, if one of several plaintiffs or defendants die after judgment by default and before final judgment, the action does not abate ; but the death being suggested on the roll, the action proceeds by or against the survivors (*q*).

Death after
Final Judgment.
Of sole Plaintiff or Defendant.
Of one of
several.

Death after Final Judgment.] If a sole plaintiff or defendant die after final judgment, and before execution, the action is not thereby abated ; but the judgment must be revived by *scire facias* by or against the executors, &c. (*r*).

But where there are several plaintiffs or defendants, and some of them die after final judgment and before execution, execution may be sued out by or against the survivors, in the names of all ; or, upon suggesting the death upon the roll, execution may be sued out by or against the survivors by name ; or, where it is desired to have execution by *elegit* of the lands of a deceased defendant, the judgment may be revived by *scire facias* against his heirs and terretenants, and against the surviving defendants, and an *elegit* thereupon sued out against the lands of the deceased, and the lands and goods of the survivors (*s*).

Death after
Execution.

Death after Execution.] If plaintiff die while defendant is charged in execution, and administration is not taken out to the plaintiff, the court will discharge the defendant, unless cause be shewn by the next of kin to the contrary (*t*). Where either party dies in execution, the other may sue out execution afresh against his land or goods (*u*). See fully as to the effect of death of plaintiff after execution, *ante*, 818, 872 ; of defendant, *Vol. I.* 620, 397.

Death after a
Writ of Error.

Death after a Writ of Error.] The death of a plaintiff in error, before errors assigned, abates the writ ; but if it happen after the assignment of errors, it does not (*x*). The death of a defendant in error, however, in no case abates the writ ; but the death being suggested on the roll, the writ proceeds against the survivor ; or, if all the defendants die, the executors or administrators may be made parties by the *scire facias ad audiendum errores* (*y*).

Death of Defendant, how far a Discharge of his Bail.

Death of Defendant, how far a Discharge of his Bail.] If the principal die at any time before the return of the *ca. sa.*, the bail are thereby discharged ; but if he have not been arrest-

(*p*) *Berger v. Green*, 1 M. & Sel. 229 : see *Calvert v. Tomlin*, 5 Bing. 1, 5 ; 2 Moo. & P. 1 S. C. : *ante* 679.

(*q*) *Ante*, 1171. See form, Chit. Forms, 640 : see *Fort v. Oliver*, 1 M. & Sel. 242.

(*r*) *Ante*, 819.

(*s*) *Ante*, 1171.

(*t*) *Parkinson v. Horlock*, 2 N. R. 240 : *Broughton v. Martin*, 1 B. & P. 176 : *Wagstaffe v. Darby*, Barnes, 366.

(*u*) 21 Jac. 1, c. 24 : see *Farncombe v. Kent*, 2 Dowl. 464.

(*x*) Vol. I. 354.

(*y*) Vol. I. 354, 355.

ed on the *ca. sa.*, and die after it is returnable, the bail are fixed (z). This, however, has reference only to bail to the action; bail in error are liable, notwithstanding the death of their principal. See also in what cases the death of the defendant is a discharge of the bail to the sheriff, *Vol. I.* 567. CHAP. XXXIII

Bankruptcy of Parties.] We have already seen how far the bankruptcy of parties abates the action (*ante*, 825, 826). Bankruptcy of Parties.

If a defendant become a bankrupt, and obtain his certificate before his bail are fixed, the bail are thereby discharged (a); and the same, it seems, as to bail to the sheriff (b). And if a bankrupt be in custody in execution, and obtain his certificate, he may be discharged upon application to the court wherein judgment was obtained, or to a judge at chambers (c). Also, before the bankrupt has obtained his certificate, a creditor at whose suit he is in custody cannot prove his debt under the fiat until he have first relinquished his action against the debtor, and all benefit whatever from the same (d). Nor can a creditor, who has taken his debtor in execution, sue out a fiat of bankruptcy against him for the same debt (e).

Marriage of Feme Plaintiff or Defendant.] The marriage of a feme sole plaintiff renders the suit abateable, but the defendant, to take advantage of it, must plead it specially (f). Marriage of Feme Plaintiff or Defendant. If a feme sole plaintiff obtain judgment, and marry before execution, a *scire facias* must be sued out in order to make the husband a party to the judgment (g). So, if a feme sole defendant, after judgment against her, marry before execution, a *scire facias* will be necessary, in order to make the husband a party to the judgment, so as to have execution against both (g); or a *ca. sa.* may be sued out against the wife alone (h). Where a feme sole defendant in ejectment married before trial, and judgment was signed and a writ of possession and *fi. fa.* issued against her, the court refused to set them aside; inasmuch as the judgment and writ of possession were not irregular, and the *fi. fa.* was inoperative (i). But if a feme sole plaintiff in error marry pending the writ, the writ is thereby wholly abated (k).

As to the effect of marriage on an action in general, see *ante*, 896, &c.

(z) Vol. I. 620.

(a) Vol. I. 620, 621.

(b) Id. 568, 571.

(c) 6 G. 4, c. 16, s. 126: and see *ante*, 907.

(d) 6 Geo. 4, c. 16, s. 59: and see *ante*, 903, 904.

(e) *Cohen v. Cunningham*, 8 T. R. 123:

see *M'Master v. Kell*, 1 B. & P. 302.

(f) *Morgan v. Painter*, 6 T. R. 265, *per cur.*: *Hollis v. Freer*, 2 Bing. N. C. 719.

(g) *Ante*, 824.

(h) *Cooper v. Hunchin*, 4 East, 521.

(i) *Doe v. Butcher*, 3 M. & Sel. 557.

(k) Vol. I. 355.

CHAPTER XXXIV.

MOTIONS AND RULES.

- SECT. 1. *Rules granted upon Motion by Counsel*, 1184.
 2. *Rules granted without Motion by Counsel*, 1195.
 3. *Enforcing Rules for Payment of Money, Costs, &c., under 1 & 2 V. c. 110, s. 18*, 1196.

SECT. 1.

*Rules granted upon Motion by Counsel.*BOOK IV.
PART I.On what Side
of the Court.

RULES granted upon motion by counsel are granted in the Queen's Bench, either on the *plea* side, or on the *crown* side of the court. There is no *crown* side in the Common Pleas or Exchequer of Pleas. But rules for attachment in cases of contempts, &c., which are indeed of a criminal nature, though having relation to a civil suit, may be moved for in any one of the courts, and they shall be considered in a subsequent part of the Work, where we shall have to treat of attachment generally.

Rules on the plea side of the courts are common or special : the former being obtained from the master without any assistance of counsel, the latter being obtained through means of that assistance.

Rules granted
upon Motion
by Counsel of
three Kinds.

Rules granted upon the plea side, upon motion by counsel, may be classed under the following heads :—1st, Those which are granted upon the motion paper being merely signed by counsel, without any motion being actually made in court ;—2ndly, Those which are considered so much as a matter of course, that the grounds of the motion are not particularized by counsel, and where in some instances counsel may hand the motion paper to one of the masters, without making the motion *vivâ voce* ;—and 3rdly, Those which are granted upon the grounds of the motion being particularized by counsel.

Rules abso-
lute in the
first Instance,
or Nisi, how
obtained, &c.

Rules Absolute in the first Instance, or Nisi, how obtained, &c.] The first class of the above rules, namely, those which are granted upon the mere signature of counsel, are absolute in the first instance, and may be obtained thus :—*Get the motion paper signed by counsel ; take it to the master's office, and draw up the rule ; serve a copy of the rule upon the opposite attorney.*

The remaining two classes of the above rules are either absolute in the first instance, or rules to shew cause. If absolute in the first instance, they are obtained thus :—*Let an affidavit be made of the facts necessary to support the application, (see post, 1207), annex it to the motion paper, and indorse the latter cor-*

rectly as to the nature of the rule required. (As to before whom the affidavit should be made see *post*, Chap. 36). Then give the motion paper and affidavit to counsel, who, after signing it, will either give it to one of the masters, or move it in court before the single judge, sitting in pursuance of the 11 Geo. 4 & 1 W. 4, c. 70, s. 1, according to the nature of the motion. The motion paper and affidavit, however, must be handed in to one of the masters, whether the rule be granted or refused. If the rule be granted, call in the evening at the master's office, and draw up the rule, and serve a copy of it upon the attorney or agent of the opposite party, as directed *post*, 1188.

If the rule required be a rule *nisi* only, give the motion paper, with the affidavit annexed, to counsel, who will move it accordingly. The motion, unless in cases of criminal information, new trials, in arrest of judgment, and other very special motions, should now in general be made before a single judge, sitting in pursuance of the 11 G. 4 & 1 W. 4, c. 70, s. 1. If granted, draw up the rule with one of the masters, and serve a copy of it as hereafter directed (a).

The affidavit upon which the motion is founded must be made before the rule is moved for, and produced in court at the time of making the motion, and must be filed or deposited with the masters, otherwise the rule shall not be drawn up, or, if drawn up, shall be of no force or effect (b). The affidavits, if not already filed, must be handed in to the master, whether the rule *nisi* be granted or refused (c). And where an affidavit has been sworn in the afternoon before a judge at chambers, after the rising of the full court, the masters will not draw up a rule *nisi* of that day. A party, in order to make use of an affidavit, sworn or filed after he has drawn up and served a rule *nisi*, must, in general, withdraw his motion and move it again (d). But before the rule is drawn up, he may apply to the court to have it drawn up on reading the supplemental affidavit also (e). Sometimes, also, as in motions to stay proceedings on bail bonds, for setting aside an attachment, or against the sheriff on payment of costs, if on shewing cause it be objected that the affidavits on which the rule *nisi* was obtained are informal, as, on account of not swearing in a strictly formal manner to a defence on the merits, or that the application is at the instance of the bail, the court will enlarge the time for discussing the rule, and permit a supplementary affidavit to be produced and filed (f). And in a recent case, the Court of Queen's Bench allowed a fresh affidavit to be filed in support of a rule *nisi* to set aside an award after the rule was obtained (g). If you intend, in arguing the case, to rely on any affidavits in the same cause, already on the files of the court, such affidavits must be specified in the rule *nisi* (h); and it may be

Affidavit in Support of the Rule, when and how made and filed, &c.

(a) See as to the form of a rule *nisi*, Chit. Forms, 649.

(b) R. H., 36 G. 3. See Williams v. Reeves, 2 Chit. Rep. 218; Ditchett v. Tollett, 3 Price, 259; Salloway v. Whorewood, 2 Salk. 461; Ex p. Dicus, 2 Dowl. 92.

(c) Ex p. Dicus, 2 Dowl. 92; Ex p. Elderton, Id. 568.

(d) Tilly v. Henly, 1 Chit. Rep. 136; Shaw v. Mansfield, 7 Price, 769.

(e) Per Littledale, J., Bail Court, M. 1838, 2 Jurist, 990.

(f) Merryman v. Quibble, 1 Chit. Rep. 127; Chit. Sum. Prac. 103; see Anderson v. Ell, 3 Dowl. 73.

(g) Perrin v. Kymer, 1 H. & W. 20; 4 Nev. & M. 477.

(h) MS., E. 1824, per Bayley, J.: De Woolf v. —, 2 Chit. Rep. 14.

BOOK IV.
PART I.

right to mention the fact to the court, at the time of making the motion. As to when such affidavits cannot be used, see *post*, 1192. An affidavit sworn *before* judgment signed, has been held good on motion to issue execution, notwithstanding a tricky writ of error(*i*). And, in general, it seems to be no objection to an affidavit that it was sworn before the precise circumstances arose on which the motion is founded, provided it could in any way be material at the time(*j*). As to the title and *jurat*, and other parts of the affidavit, see *post*, 1207 to 1213. If unnecessarily long, the court will sometimes refer it to the masters, and make the party using it pay the costs occasioned by the unnecessary matter(*k*).

What Matters
cannot be
moved on last
Day of Term.

In some cases, where the rule is *nisi* only, you cannot move on the *last* day of the term, as for an attachment(*l*) ; or in some cases to set aside an award(*m*) ; or to answer matters of an affidavit(*n*) ; or to stay proceedings(*o*). But where the subject-matter of the motion has occurred at the end of the term, and the party could not complete his affidavits before the last day, and the matter is of a nature pressing for immediate decision, the court, or the judge sitting in pursuance of the 11 G. 4 & 1 W. 4, c. 73, s. 1, on the last day of the term, will sometimes grant a rule *nisi* to shew cause in the following vacation, on an early day, (say a week or more), before a judge at chambers(*p*), or direct the party to apply by summons to a judge at chambers ; and such judge would, when justice requires it, either make an order, or stay the proceedings till the next term, in order to give the party an opportunity then to move the court. And although the full court will not permit a matter of law to be discussed on the last day of term, they, in a recent case, allowed cause to be shewn against a rule praying for a writ of restitution, where it was referred to the full court from the Bail Court, and counsel had been unable to bring it on till the last day, owing to the press of business in the court, the case being very urgent(*q*). A motion for an attachment for non-payment of costs, and against the sheriff for not returning the writ or bringing in the body, may be moved for on the last day of the term(*r*).

Notice of Motion, when
given, and
Effect of.

Previously to moving for a rule *nisi*, a *notice of the intended motion* is sometimes given to the opposite party, particularly where it is desired that time and expense may be saved by affording the adverse party an opportunity of shewing cause against it in the first instance, or where the object is to induce the court to disallow the costs of proceedings had after such notice, and before motion(*s*). In the Queen's Bench, notice of motion is necessary in the case of an in-

(i) *Baskett v. Barnard*, 4 M. & Sel. 331.

(j) *Read v. Massie*, 4 Dowl. 681: see *Lang v. Comber*, 4 East, 348.

(k) *Lewis v. Woolrych*, 3 Dowl. 692.

(l) *Anon.*, 3 Smith, 118.

(m) *Nettleton v. Crosby*, Tidd, Pract. 9th ed. 498: *Treagance v. Pinneger*, Cowp. 23.

(n) *Baily v. Jones*, 1 Chit. Rep. 744: *Ex p. Anon.*, 2 Dowl. 227: *Re Turner*, 3 Dowl. 557. The Court of Exchequer has refused to permit such a motion to be made so late in the term that the oppo-

site party could not shew cause in that term. (*Ex p. Anon.*, *ubi supra*).

(o) *Baily v. Jones*, 1 Chit. Rep. 744: *Anon.*, 2 Price, 143.

(p) Chit. Sum. Prac. 106: *sed vide Fall v. Fall*, 2 Dowl. 88.

(q) *Doe Stevens v. Lord*, 6 Dowl. 256.

(r) 1 Burr. 651: *Rex v. York*, 5 Burr. 2686: *Rex, in the case of Walker v. Whaley*, and *M'Evey v. M'Intosh*, 1 Chit. Rep. 249.

(s) Tidd, 441: see *Anon.*, 1 Wils. 30. And see Chit. Forms, 648.

formation, or to quash a conviction (*t*). It need not, in that court, be given in order to obtain a rule for a stay of proceedings (*u*), unless, perhaps, in the case of a rule under the first section of the Interpleader Act (*x*): but in the Exchequer it is otherwise (*t*); and so in the Common Pleas (*u*); and in the Exchequer a two days' notice is requisite (*z*). By a general rule of all the courts of *H. T.*, 2 *W.* 4, r. 1, s. 68, (*ante*, 1076), "a rule *nisi* for judgment as in case of a non-suit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings." Where no proceedings have been had for four terms exclusive, a term's notice of motion is in general requisite (*a*): but as the object of the rule is, that the opposite party may be informed of an intention to take a step in *proceeding to judgment*, it does not apply to applications to set aside proceedings (*b*).

The rule *nisi* thus granted, unless when moved for on the last day of the term, requires the opposite party to shew cause upon some day certain in term, usually three or four days in a town cause, or six days in a country cause, or more, (according to the distance of the opposite party's residence), after it is drawn up; but where the rule is obtained the day before the last day of term, and the transaction to which it relates took place in town, it may be drawn up for the last day of term, and may be made absolute at the rising of the court on that day. A rule *nisi* for setting aside an award, however, should not be drawn up for the last day of term; for by *R. M.*, 36 *G.* 3, counsel cannot be heard to shew cause against it on that day (*c*). A rule *nisi* granted in court will not be drawn up to shew cause in chambers; at least it is very unusual to do so (*d*).

For what
Time the
Rule should
be drawn up.

The rule should be drawn up in such a manner that all those who are to be affected by it, and upon whom it is intended to be served, shall be required to shew cause against it; for the court cannot make an order upon any person, not even on the attorney in the cause for payment of costs, unless he be called upon by the rule *nisi* to shew cause against it (*e*).

What Parties
it should in-
clude.

A rule *nisi* cannot be supported or made absolute on a ground different from that stated therein (*f*). Also, by *R. T.*, 42 *G.* 3, *K. B.* (*g*); *R. M.*, 10 *G.* 4, r. 2, *C. P.* (*h*), "where a rule to shew cause is obtained in this court for the purpose of setting aside an annuity, the several objections thereto intended to be insisted upon by the counsel at the time of making such rule absolute shall be stated in the said rule to shew cause." So, by *R. E.*, 2 *G.* 4, *K. B.*; *R. M.*, 10 *G.* 4, r. 3, *C. P.* (*i*), "where a rule to shew cause is obtained in this court to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute shall be stated in the rule to shew cause."

Grounds of
the Rule
should be
correctly
stated.

(*t*) *Rex v. Johnson*, M., 22 Geo. 3, Q. B.; Tidd, New. Pract. 241.

(*u*) *Stratton v. Regan*, 2 Dowl. 585: overruling *Fortescue v. Jones*, 1 Id. 524.

(*x*) *Smith v. Wheeler*, 3 Dowl. 431; 1 Gale, 15, S. C.

(*y*) See *Rolfe v. Brown*, 1 Hodges, 27.

(*z*) *Hannah v. Wyman*, 3 Dowl. 673.

(*a*) *Tipton v. Mecke*, 8 Moore, 579.

(*b*) *Lumley v. Hempson*, 6 Dowl. 558.

(*c*) See *post*, 1254.

(*d*) *Fell v. Fell*, 2 Dowl. 88.

(*e*) *Cheslyn v. Pearce*, 4 Dowl. 693: *Norton v. Curtis*, 3 Dowl. 245.

(*f*) See *Smith v. Clarke*, 2 Dowl. 218: *post*, 1193.

(*g*) 2 East, 569.

(*h*) 6 Bing. 347.

(*i*) And see 11 Price, 57.

BOOK IV. PART I.	If the rule be drawn up wrong by mistake, the court will order it to be corrected (<i>i</i>).
Amendment of.	<i>Service of.</i>] A copy of the rule <i>nisi</i> , or the rule <i>nisi</i> itself (<i>j</i>), must be served on the party against whom it has been obtained.
Service of.	By a general rule of all the courts of <i>H. T.</i> , 2 <i>W.</i> 4, <i>r.</i> 51, "it shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment" (<i>k</i>).
Shewing Original Rule.	It must be served at or before nine o'clock at night; if served after that hour, the service will be void (<i>l</i>). It cannot be served on a Sunday (<i>m</i>). It must be served a reasonable time before the day specified in it for shewing cause. Where a rule <i>nisi</i> to compute was served at York on the day cause was to be shewn, it was held insufficient to authorize making the rule absolute, even although ten days had elapsed since the service (<i>n</i>). As to enlarging the rule when it is served so late that the party cannot shew cause against it in time, &c., see <i>post</i> , 1190.
At what Time.	Personal service is required only in the case of a rule <i>nisi</i> for an attachment, or where a rule is served, and the money or other thing required by it is demanded, with a view to obtaining an attachment for the disobedience of it; and in such a case, the original must be shewn to the party at the time the copy is delivered to him. Service on the undersheriff, &c., is, however, sufficient in case of rule against the sheriff (<i>o</i>).
How. Personally.	Where personal service is not required, the rule may be left for the party, if he have not appeared to defend in person, at his place of business or dwelling-house, if his family be residing there, though he himself have gone away (<i>p</i>), upon his clerk, or some person who may be presumed to have authority from him to receive it; and if served upon an attorney, it must always be left for him at his chambers or place of business before nine o'clock at night, unless there be some satisfactory reason to the contrary. Service of a rule <i>nisi</i> to compute upon the defendant's mother at his residence has been deemed sufficient (<i>q</i>). Service by leaving the rule with a porter at a club-house, where the party was a member of the club, and the action was on a bill accepted by him payable at the club-house, and it was sworn that his servant called there every day for his letters, &c., was deemed sufficient (<i>r</i>). Where there is a board on the door of the defendant's chambers, desiring all messages and parcels to be left at a particular place, service there will not, perhaps, of itself answer (<i>s</i>); but if it be left there, and the person with whom it is left afterwards says that
At House or Place of Business.	<p>(<i>i</i>) <i>Ante</i>, 1136. (<i>j</i>) See <i>Leaf v. Jones</i>, 3 Dowl. 315. (<i>k</i>) In the C. P. the practice was formerly, it seems, otherwise. (<i>Wye v. Wright</i>, Barnes, 403: <i>sed vide Holmes v. Senior</i>, 4 Moo. & P. 828; 7 Bing. 162, S. C.) It was always the practice in Q. B. (<i>R. v. Smithers</i>, 3 T. R. 351; <i>Belhows v. Poultney</i>, 6 M. & Sel. 230; 1 Chit. Rep. 466, S. C.); and in Exch. (<i>Farnstone v. Taylor</i>, 2 Y. & J. 30). (<i>l</i>) R. H., 2 W. 4, r. 50: <i>ante</i>, Vol. I. 52. (<i>m</i>) <i>M'Ilham v. Smith</i>, 8 T. R. 86. (<i>n</i>) <i>Farrell v. Dale</i>, 2 Dowl. 15, <i>per Gurney</i>, B. (<i>o</i>) <i>Ante</i>, Vol. I. 550. (<i>p</i>) See <i>Payett v. Hill</i>, 2 Dowl. 668. (<i>q</i>) <i>Warren v. Smith</i>, 2 Dowl. 216; and see <i>Payett v. Hill</i>, Id. 688. (<i>r</i>) <i>Ridgway v. Baynton</i>, 2 Dowl. 183. (<i>s</i>) <i>Stout v. Smith</i> 1 Dowl. 506.</p>

he gave it to the defendant, that, it seems, will be sufficient (*r*). Service at the chambers of an attorney on his laundress will, it seems, suffice, if she act as the servant of the attorney, and the affidavit of service state that fact, or the deponent's belief to it (*u*); otherwise, not. But where it was served at the defendant's chambers on a female servant (*x*), or on the servant of the laundress, the service was deemed insufficient (*y*). And service of a rule by putting it under the door of the defendant's (an attorney's) chambers is, it seems, not sufficient, although the laundress afterwards stated that the defendant would probably have the rule in the course of the day (*z*). So, service of a rule by leaving it at chambers in college where there is no person there to receive it, is not sufficient (*a*). Nor is service at a house or place of business which the defendant has left (*b*). Nor is service on a workman on "the defendant's premises" (*c*). Nor is service on his landlady at his lodgings (*d*), unless it be afterwards ascertained that the party has received it.

Where a copy of a rule nisi was sent in a letter by post to the defendant with the rule itself, and the latter was returned indorsed, "received a copy of the within rule," and signed by the defendant, the service was held to be sufficient (*e*).

In the case of a prisoner, service with the turnkey of the prison in which he is detained will suffice (*f*).

Where several suffer judgment by default, in an action on a promissory note they acknowledge a joint cause of action, and that *quoad hoc* they are partners; service, therefore, on one is service for all (*g*).

In all cases, even where personal service is required, any irregularity in it is deemed to be waived by the party's moving to enlarge the rule (*h*), or appearing to shew cause against it (*i*). But by appearing he does not waive any irregularity in the copy of the rule served, as that it is not intitled in the cause, or the like (*k*).

Sometimes, in the absence of the opposite party, or where his residence is unknown, the court will make it part of the rule that it be served in a particular manner. Where regular service of a rule is endeavoured to be dispensed with on the ground of absence or otherwise, the affidavit must shew what efforts have been made to serve the party before secondary service will be allowed (*l*). Service of a rule by sticking it up in the office will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown (*m*). Where, on account of

By Post.

On Prisoner.

On one of several.

Irregularities in Service, how waived.

Substitution of Service, where Residence unknown, &c.

(*t*) *Engleheart v. Morgan*, 1 Dowl. 422.

(*u*) *Kent v. Jones*, 3 Dowl. 210; *Williams v. Passmore*, Id. 211, n.

(*x*) *Alanson v. Walker*, 3 Dowl. 258.

(*y*) *Smith v. Spurr*, 2 Dowl. 231; *see Ride Doid v. Drummond*, 1 Dowl. 381; *Stout v. Smith*, Id. 506.

(*z*) *Strutton v. Hawkes*, 3 Dowl. 25.

(*a*) *Chaffers v. Glover*, 5 Dowl. 81.

(*b*) *Black v. Cloup*, 4 Dowl. 270; *Castle*

v. Sowerby, 4 Dowl. 669.

(*c*) *Hitchcock v. Smith*, 5 Dowl. 248.

(*d*) *Gardner v. Green*, 3 Dowl. 343.

(*e*) *Smith v. Campbell*, 6 Dowl. 728; and

see Grant v. Stoneham, 7 Dowl. 126.

(*f*) *Moore v. Newbold*, 11 Leg. Obs. 307.

(*g*) *Figgins v. Ward*, 2 Dowl. 364; 2 C.

& M. 424, S. C.; *see Carter v. Southall*, 3 M. & W. 128.

(*h*) *Cartwright v. Blackworth*, 1 Dowl. 489.

(*i*) *Tidd*, 445; *Levy v. Duncombe*, 3 Dowl. 447.

(*k*) *Wood v. Critchfield*, 1 C. & M. 72; 1 Dowl. 587, S. C.; and *see Clothier v. Ess*, 3 Moo. & Sc. 216; 2 Dowl. 731, S. C.

(*l*) *Mudie v. Newman*, 2 Dowl. 639.

(*m*) *Wright v. Gardner*, 3 Dowl. 657.

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the defendant's residence being unknown, the court gives leave to serve him in a particular manner, they will not, in general, make a prospective rule, that service of future rules, &c., may be effected in the same way (*n*).

Affidavit of
Service.

In general, the affidavit of a service of a rule must allude to the "*rule annexed*," and not "*the rule in this cause*" (*o*). An affidavit stating the service of "*a true*," omitting the word "*copy*," has been held sufficient (*p*). So has an affidavit of the service of the original rule, and not a copy (*q*).

How far a
Rule operates
as a Stay of
Proceedings.

How far a Rule operates as a Stay of Proceedings.] As to this, see *ante*, 1045, 1187. If a rule *nisi* be moved for on the last day of term, it will not operate as a stay of proceedings, nor will the court allow the rule to be worded so as to give it such an operation, unless, perhaps, under very special circumstances (*r*). If the rule operate as a stay of proceedings, and if any proceedings, directly or collaterally, be had in the cause in the meantime, the court, upon application, will set them aside (*s*).

Abandoning
Rule Nisi.

Abandoning Rule Nisi.] A party who has obtained a rule *nisi* cannot be compelled to proceed with it (*t*); and it would seem, that he may abandon it, even after service, on giving notice of abandonment to the opposite side, and paying, or offering to pay, any costs which may have been incurred in consequence of the rule.

Shewing
Cause against
a Rule Nisi.

Shewing Cause against or Enlarging a Rule Nisi.] Upon the day appointed by the rule, the opposite party must *shew cause* against it, unless by consent it stand over until another day in the same term. In some cases cause is permitted to be shewn in the first instance, but this is a matter entirely in the discretion of the court, even where notice has been given to the party moving (*u*). No person not included in the rule *nisi* has a right to shew cause against it, even though he may have been served with a copy of the rule, and the court will not allow him his costs of appearing (*v*). After the day mentioned in the rule, no cause can be shewn against a rule *nisi* for costs of the day, or any other rule which becomes absolute without further motion (*x*).

Enlarging
Rule.

Either party, if not prepared to support or shew cause against the rule, should move that it be *enlarged* to a future day in the same or the next term; or to support or shew cause against it before a judge at chambers in the vacation. In a recent case, it was considered, that where a defendant resides such a distance from town that he cannot be served before the day for shewing cause, and the term expires on the day after that day, the rule may be revived in the next term (*y*). If a rule be drawn up to shew cause in one term, it cannot be made absolute in the next term without enlarging it, though it may be

(*n*) *Martin v. Colvill*, 2 Dowl. 694: *Layton v. Mason*, 6 Dowl. 275.

(*o*) *Fidlett v. Bolton*, 4 Dowl. 282.

(*p*) *R. v. Sheriff of Stafford*, 5 Dowl. 239.

(*q*) *Leaf v. Jones*, 3 Dowl. 315.

(*r*) *Ante*, 1187.

(*s*) *Ante*, 1045.

(*t*) *Doe Harcourt v. Roe*, 4 Taunt. 883. See form of notice, Chit. Forms, 605.

(*u*) *Doe v. Smith*, 3 Nev. & P. 335: see *Quin v. King*, 4 Dowl. 736: *Anon.*, 4 Taunt. 690.

(*v*) *Johnson v. Marriott*, 2 Dowl. 343.

(*x*) *Scott v. Marshall*, 2 C. & J. 60.

(*y*) *Rowbottom v. Ralphs*, 6 Dowl. 291.

revived(z). But it is not by any means of course that the court should thus enlarge a rule; sufficient grounds must be stated to induce them to do so(a). If the application be made by the party who obtained the rule, the court usually grant it where it is in his own delay; but not where it would have the effect of detaining the opposite party in custody; nor in other cases, without consent or some evident necessity: if moved for by the opposite party, the court will frequently enlarge it upon terms; or, if the rule were not served in time to give the party an opportunity of shewing cause against it, he may demand that the rule be enlarged as a matter of right(b). Formerly, if a party wished to have a rule enlarged, it was usual to give notice to the counsel for the adverse party of the intended motion to the court to have it enlarged; and the Court of Common Pleas would not, if the rule *nisi* had been served, have enlarged the rule unless such notice had been given(c). And now, by a general rule of all the courts of *H. T.*, 2 *W. 4*, s. 1, r. 97, "a rule may be enlarged, if the court think fit, without notice." It is not the practice to serve enlarged rules, because both parties are before the court(d). If it be enlarged to a subsequent term, it is set down in the peremptory paper, and called on in its order (*see Vol. I.* 96); but if it be enlarged or stand over to another day in the same term, either party may bring it on, upon the day so appointed, by moving to discharge the rule, or make it absolute.

In order to shew cause against a rule *nisi*, get an office copy of the rule, and of the affidavit(f) upon which it was granted; and give them, together with an affidavit when necessary, and a brief, to counsel.

Cause, how shewn.

The affidavits should be sworn, and handed to the counsel who is to shew cause, before the day named in the rule for shewing cause; and, after shewing cause, counsel cannot come on another day in such term with better affidavits(g). But, in general, an affidavit sworn after the appointed day, but before the actual time of shewing cause, may be read for the party shewing cause(h). When, however, a particular day or time for filing affidavits is prescribed by the rule *nisi*, or, as is more frequent, in the case of enlarged rules, no affidavit filed afterwards is admissible, unless under special circumstances of inevitable accident(i); and then a special motion should be made before the day of shewing cause for leave to file the affidavits *nunc pro tunc*(k). In the Exchequer, upon an enlarged rule, the affidavits must be filed before shewing cause, although it be not so expressed in the rule of enlargement(l); but in that court, if a rule is enlarged from Trinity to Michaelmas term, if the affidavits are filed a

Affidavits for, when and how made and filed, &c.

(z) *Smith v. Collier*, 3 Dowl. 100.

(a) *MS.*, E. 1814.

(b) *Tidd*, 447, 448: *see Anon.*, 1 *Smith*, 199.

(c) *R. M.*, 2 *Geo. 2*, C. P.: and *see Anon.*, *Cas. Pr. C. P.* 67.

(d) *Anon.*, 1 *Smith*, 199.

(f) This does not seem absolutely requisite. (*Pitt v. Coombs*, 1 *H. & W.* 13, Q. B.; 4 *Nev. & M.* 535, S. C.: but *see Brown v. Probert*, 1 Dowl. 659).

(g) *Kibblewhite v. Jeffreys*, 1 *Chit. Rep.*

142: *Tripp v. Bellamy*, 5 *Price*, 384: *Oakes v. Albin*, *McClel.* 582; *Chit. Sum. Prac.* 104.

(h) 1 *Chit. Rep.* 27 a: *Tilly v. Henly*, *Id.* 136: *Braine v. Hunt*, 2 Dowl. 391: *Graham v. Beaumont*, 5 Dowl. 49.

(i) *R. M.*, 36 G. 3: *Hoar v. Hill*, 1 *Chit. Rep.* 27: *Harding v. Austen*, 8 *Moore*, 523: *Turner v. Unwin*, 1 *H. & W.* 186; 4 Dowl. 16, S. C.

(k) *Hoar v. Hill*, 1 *Chit. Rep.* 27.

(l) *Barker v. Richardson*, 1 *Y. & J.* 362.

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The Argument, &c.

week before Michaelmas term, that is sufficient (*m*). And in the Queen's Bench, affidavits to shew cause against an enlarged rule must be filed a week before the term to which it is enlarged (*n*). And the same, it seems, in the Common Pleas (*o*). Where a rule is enlarged, and affidavits to be used on shewing cause, are, by the rule, to be filed on a certain day, if affidavits are filed accordingly, the opposite party has a right to take office copies, and make use of them, though the party who filed them may not be desirous of doing so (*p*). Affidavits sworn in opposition to one rule on which the allegations in them may be immaterial, cannot be used without re-swearing in opposition to another rule on which they may become material, although the same question may be intended to be raised by the first rule which was actually raised on the second (*q*). But if they could be material at the time, it would seem they may be used (*r*). If there is a defect in the intitling the affidavits produced in shewing cause against a rule, the court will sometimes allow the rule to be enlarged, in order that the title may be amended (*s*). If a rule is moved without affidavits, none can be used in answer to it (*t*). No affidavits can be used in reply to those used by the party shewing cause (*u*). It is usual for the counsel who is instructed to shew cause to hand over the affidavits on his side to the opposite counsel, in a reasonable time before the day appointed for shewing cause.

Upon the day for shewing cause, or usually the day after, (except when a rule is drawn up in one term to shew cause in another, and the same is put into the peremptory paper, when cause must be shewn on the very day for which the rule is drawn up (*v*)), your counsel will shew cause accordingly; and the counsel for the party who obtained the rule will then be heard in reply: also, if cause be shewn in the first instance, the counsel who moved for the rule *nisi* is in like manner entitled to the reply (*x*). Although the court will seldom hear more than one counsel upon moving for a rule *nisi*, yet, upon shewing cause, the number is not limited: and if there be two or more counsel on either side, they are heard in the order of their precedence. After the argument is concluded, the court deliver their opinion, and make the rule absolute or discharge it accordingly.

Reference to Master.

Or in a case involving complicated accounts, or confused or contradictory statements of fact, the court will frequently refer the case to one of the masters. On such a reference, the master may receive fresh affidavits, but cannot, except by special direction in the rule, receive *viva voce* evidence (*y*).

Motion to make Rule absolute where no Cause shewn.

If no cause be shewn on the day appointed, counsel may move on the following day to make the rule absolute, on an affidavit of service of the rule *nisi* (*z*); and if cause be not

(*m*) *Johnson v. Marryatt*, 2 Dowl. 343.(*n*) *Gilson v. Carr*, 4 Dowl. 618.(*o*) See *Harding v. Austen*, 8 Moore, 523.(*p*) *Price v. Hayman*, 4 M. & W. 8.(*q*) *Quelle v. Boucher*, 1 Scott, 283; 3 Dowl. 107, S. C.(*r*) See *Baskett v. Barnard*, 4 M. & Sel. 331; *Lang v. Comber*, 4 East, 348; *Read v. Massey*, 4 Dowl. 681.(*s*) *Anderson v. Ell*, 3 Dowl. 73; *ante*, 1137.(*t*) *Atkins v. Meredith*, 4 Dowl. 618; *Doe v. Bayton*, 1 H. & W. 270.(*u*) *Shaw v. Mansfield*, 7 Price, 709.(*v*) *Warner v. Wood*, 3 Dowl. 262.(*x*) *Anon.*, 4 Taunt. 690.(*y*) *Noy v. Reynolds*, 4 Nev. & M. 483.(*z*) See forms of affidavit, Chit. Forms, 337, 587.

then shewn, the court will grant a rule for making the former rule absolute (a). Draw up this latter rule with one of the masters, and serve a copy of it upon the opposite attorney, or agent, before nine at night (b). But when the counsel who is instructed to shew cause informs the opposite counsel that he is instructed so to do, it is the usual practice for the opposite counsel not to move for the rule absolute till a subsequent day. And if, after a rule has been made absolute, it appear that counsel was instructed in time, it is usual and proper courtesy, in most cases, to open the rule, and obtain back the brief, without compelling such counsel to move the court that he may be heard; but if this be refused, the court will order the rule to be opened (c).

CHAP. XXXIV.
SECT. 1.

The rule *nisi* cannot be supported or made absolute upon a ground different from that stated therein: therefore, if a rule *nisi* be drawn up for setting aside proceedings for irregularity, it cannot be made absolute on the ground of such proceeding being against good faith (d). The court, however, are not bound by the exact terms of the rule *nisi*, but may mould it so as to meet the justice of the case (*ante*, 1136).

Rule not made absolute on ground different from that stated in it.

Title and Date of Rule.] By rule of all the courts of H. T., 1 Vict. r. 4, it is ordered, "that henceforth every rule of court, delivered out in vacation, shall be dated the day of the month and week on which the same is delivered out, but shall be intitled as of the term immediately preceding such vacation."

Title and Date of Rule.

Costs.] The costs of the application are wholly in the discretion of the court. When the rule *nisi* is drawn up upon payment of costs, whether cause be shewn against it or not, and whether made absolute or discharged, the court almost always make the party who obtained the rule pay the costs. If the rule *nisi* be drawn up with costs, if no cause be shewn against it, it is made absolute, with costs, as of course; if cause be shewn against it, and the rule be made absolute, the court will make it absolute with costs, or without, in their discretion, according to the circumstances of the case; but, if it be discharged, the court almost uniformly discharge it with costs to be paid by the party who obtained it. Where the rule *nisi* is for setting aside proceedings for *irregularity*, if no cause be shewn against it, it is made absolute, as of course, with costs; if cause be shewn against it, and the rule be made absolute, it is made absolute almost uniformly with costs; if discharged, it is also almost always discharged with costs, to be paid the party who obtained it; and by the R. M., 37 G. 3, shall be deemed to have been so discharged, even although the rule discharging it contains no special directions upon the subject. But if the rule be silent as to costs, then, if no cause be shewn, neither party is ordered to pay costs; but if cause be shewn, the rule is made absolute or discharged, with or without costs, in the discretion of the court, according as they are of opinion that the motion ought or ought not to have

Costs.

(a) See the form, Chit. Forms, 649.
(b) *Ante*, 1188.
(c) Chit. Sum. Pract. 108.

(d) *Smith v. Clarke*, 2 Dowl. 218: and see *ante*, 1187.

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been made, and ought or not to have been resisted(*e*). In general, where a party shews cause successfully in the first instance, he is not entitled to costs(*f*). If the party who obtained the rule succeed only in part, the court will not give costs(*g*); and it seems that the opposite party would be entitled to costs if he gave notice that he was ready to yield the points on which the rule was afterwards made absolute(*h*). Where a party applies to the court where he ought to have applied to a judge at chambers, he will not in general be allowed costs(*i*). Where a rule is discharged on a mere technical objection, it is generally so without costs(*k*), but sometimes with costs(*l*). Where a rule to refer a matter to the master has been moved without costs, and the subject-matter for inquiry is matter of fact only, the court will not entertain an application for costs of the inquiry after the report of the master is made(*m*). Where libellous and impertinent matter is introduced into an affidavit in support of the rule, the court will sometimes deprive the party of the costs of the rule to which otherwise he would have been entitled(*n*).

Opening and
rescinding
the Rule, or
moving again.

Opening and rescinding the Rule, or moving again.] There is an old rule of court, *H.*, 3 *J.* 1, by which it is ordered, that if a cause be moved in court in the presence of counsel of both parties, and the court shall thereupon make an order, no person shall afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel knowingly making such motion shall not be heard here in any cause during the same term. If, however, the rule have been made absolute too soon, or either party have been taken by surprise, the court will open the rule, upon application. But they will not open a rule merely because the affidavit upon which cause was shewn against it was false(*o*); or because counsel omitted to present to their notice a statute, or other authority, which might have affected their decision(*p*). A rule made in the Bail Court is not more liable to be re-opened than a rule made in full court; therefore such a rule will not be permitted to be re-opened and argued in full court after the term in which it was made, although the judge who heard the case sanctioned the application to the full court(*q*).

This rule against opening or rescinding rules made after hearing both parties does not apply to rules which are made absolute in the first instance. The party against whom such rules are made absolute may move to discharge them, on shewing sufficient reasons why they should not have been granted, as in the case of the common rule for changing the venue (*ante*, 962).

(*e*) See *Anon.*, 1 Chit. Rep. 390, n.; *Tilly v. Henly*, Id. 136: and see *Husset v. Parkin*, 1 Bing. 65: *Rex v. Sheriff of Middlesex*, in *Duncombe v. Crisp*, 2 Dowl. 5.

(*f*) *Fitch v. Green*, 2 Dowl. 493: *Reed v. Sjeer*, 5 Dowl. 330: and see *Begbie v. Greenville*, 3 Dowl. 502.

(*g*) *Aliven v. Farnival*, 2 Dowl. 49.
(*h*) Id.: and see *M'Andrew v. Adam*, 3 Dowl. 120.

(*i*) *Vaughan v. Trewent*, 2 Dowl. 299.

(*k*) *Prudy v. Lovell*, 4 Dowl. 671.

(*l*) *Houlditch v. Swinfen*, 5 Dowl. 36.

(*m*) *Holmes v. Edwards*, 6 Dowl. 51.

(*n*) *Thompson v. Dicus*, 2 Dowl. 93.

(*o*) *Davies v. Cottle*, 3 T. R. 405: *Rossett v. Hartley*, 1 H. & W. 581: 7 A. & E. 522, n.: *Dillamore v. Capon*, 1 Bing. 398.

(*p*) *Dillamore v. Capon*, 8 Moore, 462; 1 Bing. 398, S. C.

(*q*) *Todd v. Jeffry*, 2 Nev. & P. 443; 7 A. & E. 519, S. C.

Filing Affidavits.] Whether the court grant the rule *nisi* or not, or make it absolute or discharge it, the affidavits on both sides must be filed with the masters, as has been already mentioned(*r*). CHAP. XXXIV.
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Filing Affidavits.

The instances of the rules granted in the course of a suit, upon motion by counsel, have been already fully noticed in the course of this work.

SECT. 2.

Rules granted without Motion by Counsel.

Rules obtained upon a Judge's Fiat.] THE following rules are obtained in this manner:— Rules obtained upon a Judge's Fiat.

That an infant be admitted to sue by *prochein amy*, or guardian(*s*); that an infant be admitted to defend by guardian(*t*); that plaintiff may sue in *forma pauperis*(*u*); to discharge a prisoner, upon bail being justified in vacation(*r*); for a *distringas* in non-bailable actions, in vacation(*x*); to change the venue, in vacation(*y*); to plead several matters, not enumerated in the rule, *T. T.*, 1 *W.* 4(*z*); to compute, in vacation(*a*); for leave to sign judgment on a *scire facias*, where defendant was not summoned(*b*); that a writ of inquiry be executed before a judge at *Nisi Prius*(*c*); for making a submission to arbitration a rule of court(*d*).

When you have obtained the judge's fiat, take it to the office of the masters, and they will thereupon draw up the rule. In the 6th, 8th, and 10th instances above mentioned, you must also take a motion-paper, signed by counsel, to the masters, together with the fiat.

Rules obtained from the Masters, upon a Præcipe.] The following are, it seems, the only rules obtained in this manner:— Rules obtained from the Masters, upon a Præcipe.

Rule to plead generally(*e*); to plead in *scire facias*(*f*); to avow in replevin(*g*); for a view(*h*); to appear to a *scire facias*(*i*); for judgment on demurrer(*k*); for judgment on *nul tiel* record(*l*); for judgment on *scire facias*(*m*); for judgment in error(*n*).

In these cases you make out a præcipe or memorandum of the rule you want; take it to the masters, and they will draw up the rule.

Rules obtained from the Masters, without a Præcipe.] The following are the rules obtained directly from the masters:— Rules obtained from the Masters, without a Præcipe.

Rule to declare in replevin(*o*); to appear in replevin(*p*);

(*r*) *Ante*, 1185, 1191: and see *post*, 1217.

(*s*) *Ante*, 890.

(*t*) *Ante*, 892.

(*u*) *Ante*, 918.

(*v*) Vol. I. 612.

(*x*) Vol. I. 128.

(*y*) *Ante*, 956.

(*z*) *Ante*, Vol. I. 178.

(*a*) *Ante*, 721.

(*b*) *Ante*, 833.

(*c*) *Ante*, 713.

(*d*) *Post*, 1251, 1256.

(*e*) Vol. I. 157.

(*f*) *Ante*, 835.

(*g*) *Ante*, 801.

(*h*) Vol. I. 257.

(*i*) *Ante*, 834.

(*k*) *Ante*, 665.

(*l*) *Ante*, 670.

(*m*) *Ante*, 834.

(*n*) Vol. I. 398, 391.

(*o*) *Ante*, 798.

(*p*) *Ante*, 797.

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to reply (*r*); to rejoin, surrejoin, &c. (*s*); that the defendant produce the record on *multiel* record (*t*); to return the *certiorari* in error to the Court of Queen's Bench or Common Pleas (*u*); for better bail in error (*x*); to return the *certiorari* in error to the Exchequer Chamber (*y*).

Side-bar
Rules.

Side-bar Rules.] These rules were formerly moved for by the attornies at the side-bar in court; but they may now be had of the masters, upon a *præcipe* or memorandum, in the manner above mentioned. "Side-bar rules may be obtained on the last, as well as on other days in term" (*z*). If obtained irregularly, the court, upon application, will grant a rule to shew cause why they should not be discharged; which rule may afterwards be made absolute in the ordinary way, if no sufficient cause be shewn.

The following is a list of most of the side-bar rules:—

Rule that the sheriff return the writ (*a*); that the sheriff bring in the body (*b*); for time to declare, or for further time (*c*); for special imparlance (*d*); for leave to pay money into court under 3 & 4 *W. 4, c. 42, s. 21* (*e*); for leave to discontinue before verdict, &c. (*f*); to be present at the taxing of costs, unless where notice of taxation is required to be given (*g*); for a *scire facias* to revive a judgment more than seven years old, and not ten (*h*); for the marshal or warden to acknowledge the defendant in his custody (*i*); and the consent rule in ejectment (*k*).

Rule to plead several Pleas obtained from the Masters, upon the Engrossment of the Pleas, or a Draft or Copy thereof.

Rule to plead several Pleas obtained from the Masters, upon the Engrossment of the Pleas, or a Draft or Copy thereof.] The following is a list of the pleas which may be pleaded together, or any two or more of them, under this rule:—*non assumpsit*, or *nunquam indebitatus* (*l*), or *non detinet*, with or without a plea of tender as to part, a plea of Statute of Limitations, set-off, bankruptcy of defendant, discharge under an insolvent act, *plenè administravit*, *plenè administravit præter*, infancy, and coverture (*m*).

SECT. 3.

Enforcing Rules for Payment of Money, Costs, &c., under 1 & 2 V. c. 110, s. 18.

Effect of Rules for Payment of Money, Costs, &c., under.

PREVIOUSLY to the 1 & 2 *V., c. 110*, the only mode of enforcing rules of court was by attachment, and this is still the case as to all rules not included in the provisions of that act. The 18th section enacts,—

- (*r*) Vol. I. 195.
- (*s*) Vol. I. 197.
- (*t*) *Ante*, 669, 670.
- (*u*) Vol. I. 386, 387.
- (*x*) Vol. I. 366.
- (*y*) Vol. I. 371.
- (*z*) R. H., 2 *W. 4, r. 96*.
- (*a*) Vol. I. 549, 550.
- (*b*) Vol. I. 553.
- (*c*) Vol. I. 138, 139.
- (*d*) *Ante*, 803.

- (*e*) *Ante*, 972.
- (*f*) *Ante*, 1058.
- (*g*) *Ante*, 1162.
- (*h*) *Ante*, 831.
- (*i*) *Ante*, 850.
- (*k*) *Ante*, 751.
- (*l*) *Nil debet* is the plea mentioned in the rule, but that plea is abolished, and the new plea of *nunquam indebitatus* comes within the spirit of the rule.
- (*m*) R. T., 1 *W. 4*, Vol. I. 178, 179.

“That all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law; and the persons to whom any such monies or costs, charges or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid.”

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SECT. 3.
1 & 2 V. c.
110, s. 18.

This section, it will be perceived, renders the rules mentioned in it of equal force with judgments, both with regard to their operation in equity, and the remedies by which they may be enforced at law. Execution may, therefore, be sued out upon them, and stock, shares, &c., attached in the same manner as upon a judgment⁽ⁿ⁾. And a judge's order may be enforced in the same way, after first making it a rule of court, as directed in the following Chapter^(o). And in all cases where a judgment must be registered in order to be effectual, so must a rule of court. It will therefore suffice here, to refer to the first volume of this work, pp. 338, 341, in which the provisions of 1 & 2 V. c. 110, as to the effect and registration of judgments, have been already considered.

A rule for payment of costs cannot, it would seem, be considered perfect, so as to admit of being enforced by execution, until the costs are taxed^(p).

The practice as to suing out execution on such rules is the same, mutatis mutandis, as that of suing out execution on a judgment, which is fully treated of in Vol. I., title, "Execution." No previous leave of the court or demand or notice to the party liable to pay the money or costs is necessary^(q). And the law as to the mode of executing the writs sued out is the same as that stated under the above title with respect to writs of execution on a judgment. The forms of writs of execution framed by the judges in Hilary Term, 1839, in pursuance of the 20th section of the 1 & 2 V. c. 110, will be found in the reports for that term, and in *Chit. Forms*. See also, as to the consequence of not adhering to those forms, *Vol. I.* 403.

It may be necessary to mention, that decrees and orders of the courts of equity should be enforced by process sued out of those courts, and not out of the courts of law, the equity judges having framed writs for the purpose.

(n) See Vol. I. 341, as to the effect of a judgment.

(p) See *Butler v. Bulkeley*, 8 Moore, 104.

(q) See *Wallis v. Sheffield*, Exch., M. 1839; 3 Jurist, 1002, *per Parke*, B. 3 Jurist, 1002.

CHAPTER XXXV.

SUMMONSES AND ORDERS.

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PART I.

Power of a Judge to grant, and in what Instances.

Power of a Judge to grant, and in what Instances.] WHEN, in the progress of a suit, it becomes necessary to obtain the order of the court relative to any of the proceedings, we have seen, in the last Chapter, that the parties may apply for it in term time by motion to the court. But in vacation, in most instances, or in term time, in all matters of minor importance, the same effect may be had by obtaining the order of a judge at chambers. And by the 11 G. 4 & 1 W. 4, c. 70, s. 4, every judge is authorized to transact such business at chambers or elsewhere depending (*a*) in any of the superior courts [as relates to matters over which the said courts have a common jurisdiction (*b*) and] as may, according to the course and practice of the court, be transacted by a single judge. And by 1 & 2 V. c. 45, s. 1, every judge of the superior courts is authorized "to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding, in either of the said Courts of Queen's Bench or Common Pleas, or on the common law or revenue side of the said Court of Exchequer, or relating to the granting writs of *certiorari* or *habeas corpus*, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no common jurisdiction therein, in like man-

(*a*) Even before the 1 & 2 V. c. 45, an affidavit to hold to bail sworn before a commissioner of the court, was held to be business "depending" in court, so as to authorize a judge of another court in

making an order to hold to bail at chambers. (*Griffin v. Taylor*, 6 Dowl. 620).

(*b*) Now extended to cases in which there is not a common jurisdiction. (1 & 2 V. c. 45, s. 1).

ner as if the judge transacting such business had been a judge of the court to which the same by law belongs." And by the 2nd section of the same act, a judge at chambers may relieve sheriffs and other officers under the 6th section of the Interpleader Act, (1 & 2 W. 4, c. 68), and make such order therein as shall appear to be just, and the costs are in his discretion(*b*). The judges may also, besides granting summonses, and making orders thereon at chambers, by stat. 1 G. 4, c. 55, ss. 5, 6, grant and make them upon circuit, in cases depending in any of the courts at Westminster, in which the issues, if brought to trial, would be tried upon their circuits respectively, in the same manner as if they were judges of the court in which such causes shall be so depending. In a case where a cause, in which there was no notice of set-off, having been referred by order of *Nisi Prius*, the judge, during the assizes, made a second order to enable the defendant to give a notice of set-off; the court held that this statute did not authorize this second order(*c*). Where a statute expressly directs the application to be made to the court, a judge at chambers has, it seems, no power to interfere(*d*), and *vice versa*(*e*); nor has a judge at chambers any power over a rule of the full court, unless the court direct it, or unless by consent of the parties(*f*). Unless there is a cause in court, an application cannot be made at chambers against an attorney(*g*). Though a judge at chambers may make an order for staying the proceedings on payment of debt and costs, he cannot order payment by instalments, nor give the defendant more time than he would have had by law(*h*). As to his power in respect of costs, see *post*, 1202.

The instances in which these summonses may be granted, and orders made thereon, have been already fully noticed in the course of this work.

Taking out Summons, and Service of.] To obtain a judge's order, you must in general first summon the attorney or agent of the opposite party before a judge(*i*); for which purpose, make a memorandum of the order required, and take it to the judge's clerk at the chambers in Rolls' Garden, Chancery-lane, who will thereupon make out the summons(*k*). If the order required be to set aside any proceedings for irregularity, the ground of that irregularity must be particularized in the summons, otherwise it will not be available to the party. The summons should bear date the day of the month on which it is issued, but an imperfect designation of the year, or even its omission, is immaterial(*l*). Make a copy of this summons, and, let the person who is to serve it examine it with the original, that he may be able to swear to the service, if it afterwards become necessary to do so; then serve the copy on the attorney or agent of the opposite party. As

Taking out
Summons,
and Service
of.

(b) *Ante*, 1004 to 1011.

(c) *Ashworth v. Heathcote*, 6 Bing. 596; 4 Moo. & P. 396, S. C.

(d) *Shaw v. Roberts*, 2 Dowl. 25; *Jones v. Fitzaddams*, 2 Dowl. 111; 3 Tyr. 904; 1 C. & M. 855, S. C.; *Tidd*, New Pract. 252.

(e) See *per Coleridge, J.*, 7 Dowl. 725.

(f) See *Joseph v. Perry*, 3 Dowl. 699.

(g) *Ex. p. Higgs*, 1 Dowl. 495.

(h) *Kirby v. Ellier*, 4 Tyr. 239; 2 C. & M. 315; 2 Dowl. 219, S. C.

(i) In some cases the judge may proceed *ex parte*, as in making an order to hold to bail (*post*, 1206); but if he proceed *ex parte*, where the opposite party ought to have had an opportunity of shewing cause, the order will be rescinded on application to the court. (See *Clark v. Stocken*, 2 Bing. N. C. 651).

(k) See as to the form, *Chit. Forms*, 654.

(l) *Solomon v. Nainby*, 7 Dowl. 459.

BOOK IV.
PART I.

matter of precaution, the person who is to serve the summons should indorse on the original, immediately after service of the copy, the day when and the place where served, that he may be able to swear to the service, if necessary. The summons should be served like a rule *nisi* of the court, as noticed *ante*, 1188. A personal service is not, in general, necessary. It will be sufficient if it be left with some person resident at or belonging to the place of business of the party to whom it is addressed; and if the opposite attorney or agent be an attorney of the Court of Queen's Bench, the summons may be served, by leaving a copy at the place mentioned in the book at the master's office (*m*), with any person resident at or belonging to such place; and if such attorney have not entered his name and place of abode, &c., in the said book, then fixing up the copy in the Queen's Bench Office shall be deemed a sufficient service (*n*). It is irregular, however, to leave the summons inclosed in a sealed letter; and if so delivered, in the absence of the attorney to whom it is addressed, it is no service (*o*). It must be served before nine o'clock at night, otherwise the service will be void (*p*).

When Summons operates as a Stay of Proceedings.

When Summons operates as a Stay of Proceedings.] A summons is a stay of proceedings only from the time at which it is *attendable* (*q*), and not from the time of the service (*r*); therefore a summons for further time to plead, or to plead several matters, is a stay of proceedings if it is returnable at the time the judgment office opens on the day after the time for pleading expires (*s*). And it has been held that a summons for time to plead, returnable at ten o'clock in the morning in term time at chambers, operates as a stay of proceedings, although it is well known that a judge does not attend at chambers at that hour (*t*). It operates, as a stay of proceedings from the time it is attendable until it is disposed of, provided the party who obtained it use due diligence in following it up (*u*), that is to say, by obtaining and serving a second summons on the same day the first was attendable, in case the opposite party failed to attend it, and then an order. Also, when a party has been misled by the service of a summons, the court will not permit the adverse party to take advantage of the mistake. Therefore, when a defendant took out a summons to put off a trial at the assizes, in consequence of the absence of a material witness, and the hearing of the summons was only four days before the commission day, and no order was made on it, but the plaintiff countermanded the trial, thinking he might

(*m*) See Vol. I. 52.

(*n*) R. H., 8 G. 3: R. M., 1 W. 4, r. 2, s. 8. See *Blackburn v. Peate*, 2 Dowl. 293; 2 C. & M. 244, S. C.

(*o*) *Arrowsmith v. Ingle*, 3 Taunt. 234.

(*p*) R. H., 2 W. 4, r. 50, *ante*, 52; and see further as to the service, *ante*, 1188.

(*q*) In term time it is attendable at three o'clock in the afternoon, and in vacation at eleven o'clock in the morning.

(*r*) *Morris v. Hunt*, 2 B. & Ald. 355; 1 Chit. Rep. 93, S. C.: *Rex v. Sheriff of Middlesex*, 5 B. & Ald. 746: *Glover v.*

Watmore, 5 B. & C. 769: *Anthill v. Metcalfe*, 2 New Rep. 169: *Redford v. Edie*, 6 Taunt. 240; *ante*, Vol. I. 160.

(*s*) *Wells v. Secret*, 2 Dowl. 447: *Knowles v. Vallance*, 1 Gale, 16: *Roberts v. Cuthill*, 4 Dowl. 204: *Spenceley v. Shouls*, 5 Dowl. 562.

(*t*) *Byles v. Walter*, 5 Dowl. 232: *semble*, that if the summons were not taken out *bonâ fide*, the court would not set aside intermediate proceedings. (*Bebb v. Wales*, 5 Dowl. 458).

(*u*) *Knowles v. Vallance*, 1 Gale, 16: *Spenceley v. Shouls*, 5 Dowl. 562.

be put to inconvenience, it was holden, that there had been no default which would entitle the defendant to move for judgment as in case of a nonsuit (*x*). When the object of the summons is *collateral* to the time for pleading, as to discharge the defendant out of custody on filing common bail, it will not, in general, operate as a stay of proceedings (*y*). A summons to tax an attorney's bill, though served, does not operate as a stay of proceedings from its return, so as to prevent the attorney issuing a writ, the defendant not having signed an undertaking to pay the amount of the taxation (*z*).

CHAP. XXXV.

Proceedings on Summons and Order thereon.] When the opposite attorney is served with a copy of the summons, if he have no cause to shew, he may indorse upon the summons his consent to an order being made; it is optional with him, however, whether he do so or not. If he indorse his consent, *you may immediately take the summons so indorsed to the judge's chambers, and the clerk will make out the order as a matter of course* (*a*). Then serve the order on the opposite attorney or agent. Unless the order be actually drawn up and served without delay, the other party may proceed as if no summons had been taken out, and this although he have indorsed his consent, as above mentioned (*b*).

Proceedings on Summons, and Order thereon.

Where Consent is given and indorsed on the Summons.

If the opposite attorney or agent do not consent to an order, *attend at the judge's chambers at the hour appointed by the summons, and wait there half-an-hour* (*c*); and if the opposite attorney or agent, or some person for him, do not attend within that time, then take out a second summons, and serve him with a copy of it, as at first; and if he do not attend within the half-hour after the time appointed by such second summons (*d*), then upon affidavit of the two summonses and attendances (*e*), the judge's clerk will make out the order required, and give it to you; then serve the order on the opposite attorney or agent, as directed with respect to the service of the summons (*ante*, 1199).

Where opposite Side neither consent nor attend.

In some cases, however, the summons is granted *peremptorily* in the first instance, and a second summons is not required; as for an order to deliver or tax an attorney's bill, if the first summons have been served two days before it is returnable (*f*); or for a *supersedeas* to discharge the defendant in a town cause out of custody, for not declaring against him in due time, &c. (*g*). Where on motion to set aside an irregular judgment of *nonpros*, it appeared that the plaintiff's attorney's clerk without authority, though with-

On Peremptory Summons.

(*x*) *Rendall v. Bailey*, 2 Dowl. 113.

(*y*) *Anon.*, M. T., 28 Geo. 3, Q. B.; Tidd's New Pract. 256; Tidd, 9th ed. 470.

(*z*) *Williams v. Roberts*, 3 Dowl. 512; 1 C., M. & R. 676; 1 Gale, 56, S. C.: *ante*, Vol. I. 80.

(*a*) See the form, Chit. Forms, 654.

(*b*) *Joddrell v. —*, 4 Taunt. 253: and see *post*, 1203.

(*c*) R. T., 35 G. 3.

(*d*) R. T., 1 W. 4, r. 9. That rule provides, "That hereafter it shall not be necessary to issue more than two sum-

monses for attendance before a judge, upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary." Before this rule there must have been *three* summonses, and an affidavit of attendance thereon, before the judge could make an order for non-attendance. (Tidd, 9th ed. 511).

(*e*) See a form, Chit. Forms, 654.

(*f*) R. H., 2 W. 4, r. 91: *ante*, 1199.

(*g*) R. H., 2 W. 4, r. 89: see *ante*, 867.

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PART I.Order for
Discharge,
unless Cause
shewn in
four Days.When the op-
posite Party
attends.Grounds of
Application to
be fully stated
in first In-
stance.Affidavit,
when re-
quired.Attendance
by Counsel,
&c.

Costs.

out any sinister motive, had inserted the word *peremptory* in a previous summons for the purpose, the court made the plaintiff's attorney pay costs (*h*).

In country causes, the order for a prisoner's discharge is drawn up, unless cause be shewn in four days, or such further time as the judge directs, in order to give the attorney or agent an opportunity of consulting his client (*i*).

But if the opposite attorney or agent attend upon any of these summonses, you will be called in before the judge in your turn, and upon your stating the grounds of the application, and the opposite attorney shewing cause against it, the judge either grants or refuses the order as he thinks fit.

The party applying is bound to state fully and fairly the grounds of his application. Thus, before the introduction of the new practice, which requires the grounds of irregularity to be particularized in the summons, to set aside proceedings on that account, it was considered that a party applying to set aside any proceeding was bound to state, on his first application, all the grounds why he prayed that it may be set aside (*k*). And in a case where a party applied to a judge in vacation to set aside an execution, upon the ground that he had not been served with written notice of taxation, but said nothing of a subsisting writ of error, the allowance of which must have been known to him, when he took out the summons; upon motion to the court afterwards to set aside the judgment, on the ground that a writ of error had been sued out, the court refused to interfere, because the defendant, by not communicating the circumstance in the first instance, had induced the plaintiff to take another step attended with expense (*l*).

In general, an affidavit is not necessary in support of the application or against it, unless expressly required by act of parliament, or by rule of court (*m*). Where, however, the facts are disputed, and sometimes in other cases, the judge requires one.

In ordinary cases, the attorneys, by themselves or their clerks, attend before the judge and support the application, or shew cause against it; but in cases of difficulty they usually attend with counsel, or special pleader, in which case they have precedence. If you attend by counsel or pleader, you will have to pay the judge's clerk 5s.

Costs.] A judge at chambers has power to give costs on a summons (*n*); but the practice as to his giving them is by no means certain (*o*); and the judges recently resolved not to give them but in extreme cases (*p*). Where the plaintiff signed an irregular judgment, and on the defendant taking

(*h*) *Finnerty v. Smith*, 1 Bing. N. C. 649.

(*i*) R. H. 2 W. 4, r. 89: see *ante*, 367: see Bagley's Pract. 21.

(*k*) 7 T. R. 455; 1 H. Bla. 101; 1 East, 537; 5 Taunt. 850; Bagley's Pract. 26.

(*l*) *Thorpe v. Beer*, 1 Chit. Rep. 124.

(*m*) See *Best v. Argles*, 3 Dowl. 701.

(*n*) *Doe Prescott v. Roe*, 1 Dowl. 274;

2 Moo. & Scott, 119; 9 Bing. 104, S. C.:

Hughes v. Brand, 2 Dowl. 131: *sed vide*

Spicer v. Todd, 2 C. & J. 165; 1 Dowl.

306, S. C.: *Keat v. Lee*, 2 B. & Adol. 415;

1 Dowl. 52, S. C. In *Collins v. Aaron*, 4 Bing. N. C. 233; 6 Dowl. 423, the judge taxed the costs of an amendment at 3s. 4d., and the court held he had power so to do.

(*o*) See *Davy v. Brown*, 1 Scott, 384; 1 Bing. N. C. 460.

(*p*) *Re Bridge and Wright*, 4 Nev. & M. 5; 2 Ad. & Ell. 48, S. C.: *Sheriff v. Gresley*, 5 Nev. & M. 491; 1 H. & W. 588, S. C.: *Doe Prescott v. Roe*, 2 Moo. & Scott, 119; 9 Bing. 104; 1 Dowl. 274, S. C.

out a summons to set it aside, he informed the defendant that the judgment was withdrawn, the court held that the defendant had no right to get an order drawn up for setting aside the judgment with costs; and therefore that he was liable to pay the expense of it (*q*). And where a judgment was set aside for irregularity, on a summons before a judge at chambers, and no order was made as to costs, the court refused to order the payment of costs of setting aside the judgment, and discharged a rule obtained for that purpose with costs (*r*). It is not usual for the judges to give costs at chambers on the discharge of a summons (*s*), but where an action of debt having been settled, a summons was afterwards taken out by the defendant to set aside the proceedings on the ground of irregularity, which was dismissed, a rule was granted to shew cause why the costs of attending to set aside the summons should not be paid (*s*). If the judge refuses to give costs, the party should not in general apply to the court for them (*t*). If nothing is said in the order as to the costs of it, such costs will not in general be costs in the cause (*u*).

When the order contains a condition which requires the taxation of costs, it may be taken, in the first instance, to the master for an appointment, which he will mark on the original order. The appointment so marked should then be copied on the order to be served, and the master's appointment should, of course, be attended to, or he will proceed *ex parte*, without making a second appointment (*v*).

Order not Operative, unless Drawn up and Served.] If an order be made, it must be drawn up and served forthwith, or the opposite party may treat it as abandoned and proceed, even though the order was drawn up by consent (*x*). There is a rule in the Queen's Bench of *H. T.*, 59 *Geo.* 3, that "no summons for further time to plead, reply, or rejoin, or summons for further particulars of the plaintiff's demand, defendant's set-off, or other particular, be granted in any action, depending in that court, unless the last previous order for time, further time, or particulars respectively, be first drawn up, and such order produced at the time of applying for any such summons."

Who may draw up the Order.] Where, upon a summons attended at a judge's chambers, the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not (*y*). If he do not draw it up, and the party summoned considers that the order pronounced is in his favour, he should take out a cross summons for the purpose of

- (*q*) *Hargrave v. Holden*, 3 Dowl. 176.
 (*r*) *Davy v. Brown*, 1 Bing. N. C. 460; 1 Scott, 384; 1 Hodges, 22, S. C.
 (*s*) *Thornicroft v. Dellis*, 11 Leg. Obs. 261; Tidd, New Pract. 256.
 (*t*) See *Davy v. Brown*, 1 Scott, 384; 1 Bing. N. C. 460, S. C.
 (*u*) *Mummery v. Campbell*, 10 Bing. 511; 4 Moo. & Scott, 379.
 (*v*) R. H., 2 W. 4, r. 1, s. 92.
 (*x*) *Charges v. Farhall*, 4 B. & C. 865; 7 D. & R. 422, S. C.; *Edensor v. Hoffman*, 2 C. & J. 140; *Sedgwick v. Allerton*, 7 East, 542; see *Wright v. Stevenson*, 5 Taunt. 850; *Wilson v. Hunt*, 1 Chit. 647.
 (*y*) *Maddougall v. Nicholls*, 5 Nev. & M. 366; 3 Ad. & Ell. 813; 1 Har. & W. 462, S. C.; Tidd, New Pract. 258; *Solly v. Richardson*, 6 Dowl. 774.

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PART I.

obtaining a similar order (*z*). And if parties, being before a judge at chambers, go by consent into matter not within the summonses, and the judge make a minute of an order, the party in whose favour such minute is made, is, it seems, entitled to draw up an order accordingly (*z*).

Effect of the
Order, and
enforcing of.

Effect of the Order, and enforcing of.] The order made as above mentioned, if acquiesced under, is in effect as binding and imperative as a rule of court (*a*), and it may in like manner be enforced by attachment, or if for payment of money or costs, by execution (*b*), by previously moving to make, and making it a rule of court (*c*). Where an attorney is in contempt by disobeying a rule of court, founded on a judge's order, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll (*d*). A conditional order for payment of costs cannot be enforced by attachment, although the step to be allowed on payment of costs has been taken without such payment (*e*). The rule for making a judge's order a rule of court is absolute in the first instance (*f*); where the original order cannot be obtained, a duplicate may be sometimes made a rule of court (*g*). If a judge's order is made in vacation, it cannot be made a rule of court as of the preceding term (*h*).

When and
how it may
be abandoned.

When and how it may be abandoned.] It seems that when the order is drawn up and served, it is binding upon the party who obtains it (*i*), unless, indeed, it gives him liberty to adopt its terms or not; as an order for liberty to amend (*k*), or plead several matters, &c., in which case he may abandon it (*l*), or perhaps any part of it, if such part does not affect the rest. When an order for a stay of proceedings is obtained, there is a *locus penitentiae* until it is served; but when once served, it cannot be got rid of without an instrument of equal force and authority; therefore defendant cannot abandon an order for particulars by notice at foot of a demand of declaration, and judgment of *nonpro*s signed pending such order will be irregular (*m*).

How im-
peached.

How impeached.] If the party, against whom an order has been made, be dissatisfied with it, if made in term, he may immediately apply to the court to have it set aside (*n*); or, if made in vacation, he may apply to the court in the following term to have, not only the order, but also all other proceedings which have been had under it, set aside (*o*); by which means

By Applica-
tion to the
Court.

(*z*) *Macdougall v. Nicholls*, 5 Nev. & M. 366; 3 Ad. & Ell. 813; 1 Har. & W. 462, S. C.; *Tidd*, New Pract. 258; *Solly v. Richardson*, 6 Dowl. 774.

(*a*) See *per* Lord Mansfield, C. J., in *R. v. Wilkes*, 4 Burr. 2569; *Wood v. Plant*, 1 Taunt. 47; *Lench v. Pargiter*, Doug. 68; *Briggs v. Sharp*, 6 Bing. 517.

(*b*) 1 & 2 V. c. 110, s. 18, *ante*, 1196.

(*c*) See *ib.*: *Hart v. Draper*, 2 Marsh. 358; 7 Taunt. 43, S. C.; *Baker v. Rye*, 1 Dowl. 689; *Ex p. Lawrence*, 2 Dowl. 230; *Jameson v. Raper*, 3 Moore, 65, n.

(*d*) *Ex p. Townley*, 3 Dowl. 39.

(*e*) *Res v. Fenn*, 2 Dowl. 182; *Turner v. Gill*, 3 Dowl. 30.

(*f*) *Wilson v. Northrop*, 2 C., M. & R.

326; *Swaine v. Stone*, 4 Moo. & Scott, 584.

(*g*) *Thomas v. Phelby*, 2 Dowl. 145.

(*h*) *Res v. Price*, 2 C. & M. 212; 2 Dowl. 233, S. C.

(*i*) *Wilson v. Hunt*, 1 Chit. Rep. 647.

(*k*) *Black v. Sangster*, 3 Dowl. 206; 1 C., M. & R. 521, S. C.

(*l*) *Macdougall v. Nicholls*, 3 Ad. & Ell. 813; 5 Nev. & M. 366; 4 Dowl. 76, S. C.

(*m*) *Wickens v. Cor*, 4 M. & W. 67.

(*n*) *Jones v. Kirk*, 1 Chit. 246; *Pewtress v. Hardy*, 1 B. & Ad. 154; *Doe Durrant v. Moore*, 4 Moo. & P. 761; 7 Dowl. 124, S. C.; *Ewbank v. Owen*, 5 Ad. & Ell. 298.

(*o*) See *per* Lord Mansfield, C. J., in *Res v. Wilkes*, 4 Burr. 2569.

he obtains the opinion of the court upon the propriety or validity of the order, and it is set aside or confirmed accordingly. The application may be made before a single judge sitting in the bail court(*p*). The application to set aside the order should be made on producing a copy of the order(*q*), which should be annexed to or set forth in the affidavit, or the affidavit should state the substance of the order, which has been held sufficient without producing a copy(*r*). It does not seem necessary to make the order a rule of court before moving to set it aside(*s*). Where the application is to set aside anything done under an order, (for instance, to strike out pleas), it should include a discharge of the order(*t*). The application should be made as early as possible, so as to prevent the opposite party from incurring further expense(*u*), and at all events in the next term, if the order has been made in vacation(*v*); and after a judge's order had been made a rule of court, it is too late to object in answer to a rule calling upon the party to pay money in pursuance of such order, that the judge had no power to make it(*x*). The same affidavits as were used before the judge on obtaining the order may be used on the application to set it aside(*y*). In general no costs are allowed on the rescinding(*z*).

When an order has been made, or the conditions annexed to an order imposed, under a mistake, or when new circumstances arise which render it clearly essential to the justice of a case, a judge will vary or amend his order, or will sometimes even rescind it, when it appears to have been irregularly and improperly obtained(*a*). The application for this purpose must be by summons, as in the first instance, which will be granted by any judge of the court, but it can only be heard before the judge who made the order; and, in general, no judge will hear a summons relating to, or, indeed, interfere in any way with the order of another judge(*b*), unless the judge who made the order is not in town, or some new matter is to be considered, or when urgent and peculiar circumstances render it obviously necessary for the purposes of justice(*c*).

By Summons before a Judge.

The decision of a judge at chambers as to amendments of pleadings, within the limits of its discretionary power over such amendments, will not be interfered with by the court(*d*). And the court will not interfere with the judge's decision, as to the costs of the application to him(*e*). The court has power, it seems, in an action brought by executors, to review a judge's order granting a discontinuance without costs(*f*). If an order be made *ex parte* in a case where the party against

When the Court will interfere or not.

- (*p*) *King v. Myers*, 5 Dowl. 696.
- (*q*) *Hoby v. Pritchard*, 5 Dowl. 300.
- (*r*) *Shirley v. Jacobs*, 3 Dowl. 101.
- (*s*) *Spicer v. Todd*, 2 C. & J. 165; 1 Dowl. 306, S. C.: *sed vide Hawes v. Johnson*, 1 Y. & J. 12.
- (*t*) *South Eastern Railway v. —*, Q. B., M. 1839, 3 Jurist, 1076.
- (*u*) *Thompson v. Carter*, 3 Dowl. 657.
- (*v*) *Granby v. Frowd*, 11 Leg. Obs. 213.
- (*x*) *Wilson v. Northorp*, 4 Dowl. 441.
- (*y*) *Pickford v. Ewington*, 4 Dowl. 453; 1 T. & G. 29; 1 Gale, 357, S. C.
- (*z*) *Hargreave v. Holden*, 3 Dowl. 176; *Wright v. Skinner*, T. & G. 69; *Wilkes v. Otley*, 2 Nev. & P. 99; *Ewbank v. Owen*,

- 5 Ad. & Ell. 298.
- (*a*) *Clark v. Manns*, 1 Dowl. 656; *Bagley's Prac.* 29.
- (*b*) 2 Chit. Rep. 83; *Wright v. Stevenson*, 5 Taunt. 850.
- (*c*) *Price's N. P.* 317.
- (*d*) *R. v. Archbishop of York*, 3 Nev. & M. 453; 1 Ad. & Ell. 394, S. C.: and see *Atkinson v. Bayntun*, 1 Bing. N. C. 740; 1 Hodges, 144, S. C.
- (*e*) See *Davy v. Brown*, 1 Scott, 381; 1 Bing. N. C. 460, S. C.
- (*f*) *Lakin v. Massie*, 1 Gale, 270; 4 Dowl. 239, S. C.: *sed vide Maddock v. Phillips*, 5 Nev. & M. 370; 3 Ad. & Ell. 193, S. C., *contra*.

BOOK IV. whom it was made is entitled to a summons, the order will
PART I. be set aside(*f*). An order obtained from a judge's clerk,
— under a mis-statement, is, it seems, a nullity(*g*).

Orders grant-
ed without
Summons.

Orders granted without Summons.] Besides the orders granted upon summons, in the instances before mentioned, there are some cases where a judge at chambers will make an order without summons; such as an order that defendant may be holden to bail(*h*); that plaintiff may issue a *distringas* to compel the appearance of, or to outlaw defendant(*i*); that plaintiff may sue *in formâ pauperis*(*j*); that unless an infant defendant appear, John Doe may be assigned as his guardian, and a common appearance be entered for him(*k*); to compel the attendance of a witness, or the production of documents, before an arbitrator(*l*); to amend the *teste* or return of a *distringas*, or *habeas corpora*, or clause of *Nisi Prius*(*m*); or to charge a prisoner in custody on a criminal account with a civil action(*n*), or to enter up judgment on an old warrant of attorney(*o*).

There are also other cases in which the judge's order or fiat merely requires one of the masters to draw up a rule of court, where such rule becomes necessary in vacation(*p*).

How to pro-
ceed if Order
refused, and
Party dissatis-
fied with Re-
fusal.

How to proceed if Order refused, and Party dissatisfied with Refusal.] When an order is refused by a judge, the applicant, if dissatisfied, should apply to the court, and not to another judge. The practice of applying to a second judge for an order which has been refused by the first, has been severely reprobated(*q*). And when notice to justify bail was given before one judge, who decided that he had no authority to take the bail, and the defendant's attorney afterwards gave two other notices of the same bail to justify before different judges, the Court of King's Bench, upon application against the attorney, referred it to the master to ascertain what costs were incurred by the plaintiff in opposing bail under such vexatious circumstances(*r*).

(*f*) *Clarke v. Stocken*, 2 Bing. N.C. 651.

(*g*) *Woosnam v. Price*, 1 C. & M. 352;
sed quære?

(*h*) Vol. I. 497.

(*i*) Vol. I. 131.

(*j*) *Ante*, 918, 919.

(*k*) *Ante*, 893.

(*l*) *Post*, 1229.

(*m*) *Ante*, 1128, 1129.

(*n*) *Ante*, 854.

(*o*) *Ante*, 693.

(*p*) See *ante*, 1195. See form of fiat,
Chit. Forms, 650.

(*q*) *Wright v. Stevenson*, 5 Taunt. 850.

(*r*) *Steer v. Smith*, 1 Chit. Rep. 80.

CHAPTER XXXVI.

AFFIDAVITS.

<i>Title</i> , 1208.	<i>When to be Sworn</i> , 1217.
<i>Deponent's Abode</i> , 1211.	<i>When to be Filed</i> , <i>id.</i>
<i>Deponent's Addition</i> , 1212.	<i>How long in Force</i> , 1218.
<i>Deponent's Signature</i> , 1213.	<i>Defects, when Aided, Amended,</i>
<i>Jurat</i> , <i>id.</i>	<i>&c.</i> , <i>id.</i>
<i>Before whom to be Sworn</i> , 1215.	

CHAP. XXXVI.

Contents of
the Affidavit.

THE contents of an affidavit must necessarily vary according to the circumstances of each case. The rules relating to them in particular cases, will be found under their respective heads throughout the Work (*a*). But the only general rule which can be laid down is, that the affidavit should set forth all the facts and circumstances necessary to be stated in each particular case, explicitly and with certainty (*b*), and that where a deponent swears to any fact as within his own knowledge, he must swear directly and positively. For instance, material dates must be sworn to positively, and the word "about" being considered to depend upon the conscience of the party making the affidavit, should not be used in specifying them (*c*). Where the fact is not within his knowledge, so much precision is not necessary (*d*). Where the deponent states a fact from information, he should in general add that he believes it to be true. An affidavit that the deponent "verily believes" is entitled to some credit in the absence of a contrary affidavit (*e*). Affidavits in support of a rule to set aside proceedings must shew a clear case for relief; and therefore, when it was moved to set aside a judgment on the ground that the accounts between the parties had been investigated and found to be incorrect, and that the plaintiff had agreed that any error should be rectified, it was held that the affidavits were defective, in not stating that the error was in the amount (*f*). So, on application for a review of taxation of costs, the affidavit should state the specific objections to the taxation (*g*).

When the affidavit is made by one person only, it begins thus: "*A. B., of ———, Gentleman, maketh oath and saith, that*" &c.; but when made by more than one person, then thus: "*A. B., of ———, Gentleman, and C. D., of ———,*

(*a*) As to the form of an affidavit of merits, see *ante*, 705, 706. Affidavit to obtain judge's order to hold to bail, *ante*, Vol. I. p. 484; affidavit of service in ejectment, *ante*, 743. And see Index.

(*b*) As to the degree of certainty required, it has been held that an allegation that deponent objects that there is no notice, &c., is not a sufficient averment that

in fact there was no notice. (*R. v. Manchester Railway Co.*, 3 Nev. & P. 439).

(*c*) *Willes v. James*, 1 Dowl. 498; see *Basket v. Barnard*, 4 M. & Sel. 231.

(*d*) See *West v. Eyles*, 2 W. Bl. 1059.

(*e*) Per Lord Abinger, *Maton v. Hayter*, Eq. Exch. T. T. 1839; 3 Jurist, 769.

(*f*) *Preedy v. Lovell*, 4 Dowl. 671.

(*g*) See *Daniel v. Bishop*, M'Clel. 61.

BOOK IV.
PART I.

Esquire, severally make oath and say; and first this deponent A. B., for himself saith, that" &c.; "and this deponent C. D., for himself saith, that" &c. And if there be any facts to which both of them can swear, then "*and these several deponents, A. B. and C. D., say, that" &c.*(*h*). An affidavit in which the word "oath" was omitted (*i*), and another in which the word "said" was substituted for "saith," were held insufficient(*j*). So was an affidavit of service in ejectment omitting the word "copy"(*k*). But, in general, clerical errors and mistakes in spelling are not considered a sufficient ground for rejecting an affidavit when the meaning is clear(*l*). An unauthorized alteration in the *jurat* or other parts of the affidavit after it is sworn, will render it null, and invalidate any proceeding founded on it(*m*). It may be here observed that the affidavit should not contain unnecessary matter; and if it does so to any great extent, the court will refer it to the master, and make the party using it pay the costs occasioned by the unnecessary matter(*n*).

Title.

In the Court.

Title.] If there be a cause in court, all affidavits made use of in the progress of it must be intitled correctly *in the court*, or otherwise shew that it is sworn in the court(*o*). An affidavit of debt not intitled in the court, but purporting at the foot of it to have been sworn before "*J. Y., deputy filazer" (p)*, or "*at the King's Bench Office, Inner Temple, before me, T. C."*(*q*), has been held sufficient. So, if the affidavit be sworn before a commissioner of the court, it need not be intitled in it, if on the face of the affidavit or *jurat* he appear to be such commissioner(*r*). And by *R. H., 2 W. 4, r. 4*, "*an affidavit sworn before a judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such judge belongs, though not intitled of that court, but not in any other court, unless intitled of the court in which it is to be used.*" Where an affidavit of debt was sworn in Ireland, before a commissioner of the Common Pleas and Exchequer, it was holden that the title of the court need not be prefixed to the affidavit when sworn, but that the affidavit might be taken before such commissioner to be afterwards intitled, and used in either of the courts(*s*). And it seems that it may be used in either court without being previously intitled, if it appear by the *jurat* that the person before whom it was sworn is a commissioner of both courts(*t*).

(*h*) *Preedy v. Lovell*, 4 Dowl. 671. See Chit. Forms, 654.

(*i*) *Oliver v. Price*, 3 Dowl. 261.

(*j*) *Howorth v. Hubbersty*, 3 Dowl. 455.

(*k*) *Anon.*, 1 Chit. 562, n.

(*l*) *Howorth v. Hubbersty*, 3 Dowl. 455.

(*m*) *Finnerty v. Smith*, 1 Bing. N.C. 649; *Wright v. Skinner*, 5 Dowl. 92.

(*n*) *Bromley v. Foster*, 1 Chit. Rep. 562; *Lewis v. Woolrych*, 3 Dowl. 692; *Es p. Heullan*, 7 Price, 594. In *Williams v. Hunt*, 1 Chit. 321, the court refused a rule to review taxation, because the affidavit on which it was moved contained a mass of irrelevant matter as to the merits of the case.

(*o*) *Molling v. Poland*, 3 M. & Sel. 157;

Rev v. Hare, 13 East, 189; *Osborn v. Tatum*, 1 B. & P. 271. As to proceedings on *habeas corpus cum causa*, see *Perrin v. West*, 5 Nev. & M. 291; and see *Rolfe v. Burke*, 12 Moore, 298; 4 Bing. 101, S. C., in which case the affidavit was intitled, in the "Common Place" instead of "Common Pleas," and held good.

(*p*) *Bland v. Drake*, 1 Chit. Rep. 175.

(*q*) *Howell v. Wilkin*, 7 B. & C. 783.

(*r*) *Urquhart v. Dick*, 3 Dowl. 17. In that case the affidavit was sworn in Scotland.

(*s*) *Perse v. Browning*, 1 M. & W. 362; see *White v. Irving*, 5 Dowl. 289.

(*t*) *White v. Irving*, 5 Dowl. 289.

The affidavit, if made after the commencement of a suit, in support of or opposition to a motion respecting the suit, must also be intitled *in the cause*, (if any), stating the christian names as well as the surnames of *all* the parties(*u*). Intitling it *T. v. G.* "and others," would be bad(*v*). The christian name must be written at *length*(*x*). It must also clearly appear which of the parties are plaintiffs and which are defendants(*y*). If defective in either of these respects, the court will not allow them to be read, even although the adverse party be willing to waive the objection(*z*). And if the affidavit be in verification of a plea in abatement, the plaintiff might, for such a defect, sign judgment for want of a plea(*a*). An affidavit in a cause intitled "*G. Shrimpton v. Wm. Carter, the elder, sued as William Carter,*" the cause being *G. Shrimpton v. Wm. Carter*, has been rejected as badly intitled(*b*). And it has been held that affidavits in support of a motion for setting aside a writ of summons or *distringas* must be intitled in the same names as are in the summons, although the parties are there incorrectly described, and not in the right names(*c*). An affidavit in a cause intitled "*C. D. ats. A. B.,*" instead of "*A. B. v. C. D.*" is bad(*d*). An affidavit in a non-bailable action against two *before declaration* may, it seems, be intitled "*A. v. B.,*" (the defendant who makes the application)(*e*), or "*A. v. B. sued with C.*" (the other defendant)(*f*). The affidavit should also shew, in its title, the character in which the parties sue or are sued(*g*). Even styling the plaintiff as "assignee, &c.," without saying of whom, is defective(*h*). And the Court of Exchequer declined to act upon an affidavit intitled "*A. v. B., executor &c.,*" without specifying the party of whom the defendant was executor(*i*). It seems doubtful whether the same rule applies in the case of persons empowered to sue by act of parliament(*k*). But where, in a declaration in ejectment, the lessors of the plaintiff are described to be executors, the affidavit of service need not, it seems, in stating the name of the cause, notice the character of the lessors stated in the declaration(*l*). And where in a declaration in ejectment there are both joint and separate demises, the title of the affidavit need not distinguish the joint from the separate(*m*). The intitling of an affidavit by describing the plaintiff as "*Gent., one*" &c., the plaintiff not being an attorney, does not vitiate it, and the description may be rejected as surplusage(*n*). If an action be against several defendants, if they be not all in

(*u*) *Fores v. Diemar*, 7 T. R. 661; *Bullman v. Callow*, 1 Chit. Rep. 727; *Anderson v. Baker*, 3 Dowl. 107; see *Dand v. Barnes*, 1 Marsh. 403; 6 Taunt. 5, S. C.; *Mackenzie v. Martin*, Id. 286. The affidavit of verification annexed to a plea in abatement need not be intitled if the plea be so. (*Prince v. Nicholson*, 5 Id. 333; see also *Doe Spencer v. Want*, 8 Id. 647; *Thorpe v. Hook*, 1 Dowl. 494).

(*v*) *Tomkins v. Geach*, 5 Dowl. 509.

(*x*) *Masters v. Carter*, 4 Dowl. 577.

(*y*) *Harris v. Griffiths*, Id. 289.

(*z*) *Owen v. Hurd*, 2 T. R. 644.

(*a*) *Poole v. Pembrey*, 1 Dowl. 693.

(*b*) *Shrimpton v. Carter*, 3 Dowl. 648; see *Borthwick v. Ravenscroft*, *infra*.

(*c*) *Borthwick v. Ravenscroft*, 7 Dowl. 393; 5 M. & W. 31, S. C.

(*d*) *Richard v. Isaac*, 1 C., M. & R. 136; 2 Dowl. 710, S. C.

(*e*) *Dand v. Barnes*, 6 Taunt. 5.

(*f*) *Mackenzie v. Martin*, 6 Taunt. 286.

(*g*) *Steyner v. Cottrell*, 3 Taunt. 377; *Wright v. Hunt*, 1 Dowl. 457; *Anon., Executors v. Administrators*, Id. 97.

(*h*) Id.: *Phillips v. Hutchinson*, 3 Dowl. 23.

(*i*) *Clark v. Martin*, 3 Dowl. 222.

(*k*) *Marshall v. Adams*, Bail Court, T. 1838, per *Coleridge, J.*, 2 Jurist, 944.

(*l*) *Doe Jenks v. Roe*, 2 Dowl. 55.

(*m*) *Doe v. Roe*, 5 Dowl. 447.

(*n*) *Reeves v. Crisp*, 6 M. & Sel. 274.

BOOK IV.
PART I.

court, the affidavit may be intitled in the names of those only who are in court(*o*). On an application against a claimant under the Interpleader Act for costs, the affidavits should be intitled in the original action(*p*). Where a cause is removed into the Exchequer Chamber by writ of error, all affidavits in the Exchequer Chamber must be intitled in the cause in error, and not in the original action(*q*). And so on a writ of false judgment(*r*). It seems that the affidavits in support of a rule for a *procedendo* should not be intitled in the cause in the inferior court, but in the superior court only(*s*). On moving for a rule *nisi* for a *certiorari*, the affidavits must not be intitled in any cause(*t*). And the same in moving for a criminal information(*u*). In shewing cause against a criminal information, it is optional to intitle them or not(*x*). An affidavit in support of a rule to set aside a bail-bond, on the ground of a mistake in the defendant's surname, must be intitled with the right name of the party, and not with the name by which he was arrested(*y*). And an affidavit to set aside a *ca. sa.* for misnomer should be intitled in the name by which he was sued(*z*). An affidavit to support a rule *nisi* for staying proceeding on a bail-bond may be intitled in the action against the bail(*a*); or in the original action(*b*); if, however, proceedings against bail be founded upon a judgment irregularly obtained by the plaintiff, only one application is necessary to set aside the irregular judgment and the proceedings against the bail; and the affidavits, in such a case, must be intitled in the original action(*c*). On an application by bail to set aside proceedings in the original action, and in the action against themselves, the proceedings may be intitled in both actions(*d*). A motion on behalf of the same plaintiff, in two different actions, upon the same ground of application, may be made upon one affidavit intitled in both actions(*e*). Upon an application for a rule that an attorney pay over a sum of money, or give up a document received by him in a particular cause, the affidavits must be intitled in the cause in which the money or document was received(*f*). And they may be so intitled although judgment has been signed and execution issued(*g*). But where there is as yet no cause in court, the affidavits should not be intitled; otherwise the court probably would not allow them to be made use of. Thus, an affidavit to hold to bail before 1 & 2 *V. c.* 110, must not have been intitled; or, if intitled, it could not be read(*h*), because, as yet, there was no cause in court; and this is, it

(*o*) *Dand v. Barnes*, 6 Taunt. 5; 1 Marsh. 403. S. C.; 6 Taunt. 826: but see *Bullman v. Callow*, 1 Chit. Rep. 727, 728 a.

(*p*) *Elliott v. Sparrow*, 1 H. & W. 370.

(*q*) *Gandell v. Rogier*, 4 B. & C. 862; 7 D. & R. 259, S. C.

(*r*) *Watson v. Walker*, 8 Bing. 315; 1 Moo. & Scott, 437, S. C.

(*s*) *Jameson v. Schonswar*, 1 Dowl. 175.

(*t*) *Ec p. Nohro*, 1 B. & C. 267.

(*u*) *R. v. Harrison*, 6 T. R. 60: *R. v. Robinson*, 6 T. R. 642.

(*x*) *Id.*

(*y*) *Finch v. Cocker*, 2 Dowl. 383; 2 C. & M. 412, S. C.: *Shaw v. Robinson*, 8 D. & R. 423.

(*z*) *Thorpe v. Hook*, 1 Dowl. 494,

(*a*) *Roberts v. Giddins*, 1 B. & P. 337: *Kelly v. Wrother*, 2 Chit. Rep. 109.

(*b*) *Stride v. Hill*, 4 Dowl. 709: *Lines v. Chetwode*, Exch. MS., 16th Jan. 1832; 2 Tyr. 177: *sed vide Ham v. Philcox*, 1 Bing. 142; 7 Moore, 521, S. C. *contra*: and see *Blackford v. Hawkins*, 7 Moore, 600.

(*c*) *Barlow v. Kaye*, 4 T. R. 688.

(*d*) *Pocock v. Cockerton*, 7 Dowl. 21.

(*e*) *Pitt v. Evans*, 2 Dowl. 226: but see *Harper v. Mount*, Bail Court, M. 1838, *per Littledale, J.*, 2 Jurist, 990.

(*f*) MS., E. 1814: *Simes v. Gibbs*, 6 Dowl. 310.

(*g*) *Simes v. Gibbs*, 6 Dowl. 310.

(*h*) *R. T.*, 37 G. 3.

seems, still the case if the affidavit be sworn before the writ of summons is sued out; which, according to a late resolution of the judges, it may be (*i*). But if sworn after the writ of summons has been issued, then it would seem that it ought to be intitled in the cause. In moving for leave to enter up judgment on an old warrant of attorney, the affidavit may be intitled in a cause (*j*), but this is not absolutely requisite (*k*). So, an affidavit on an application for the delivering up of a warrant of attorney may be intitled in a cause (*l*). Where a submission to arbitration is made a rule of court, and no action is pending, the affidavits in support of an application to set aside the award, or for an attachment for not performing it, need not be intitled (*m*), although the affidavits in shewing cause must (*n*). But where a cause is referred under an order of *Nisi Prius*, the affidavits must be intitled in the action (*o*). The proceedings upon an attachment in a civil suit being upon the civil side of the court until the attachment is actually awarded, the affidavits in applying for the rule *nisi* (*p*), and in shewing cause against it (*q*), must be intitled in the action; but after the rule is made absolute, all future affidavits (as upon an application to set aside the attachment, or the like) must be intitled "*The Queen v. —*" (the party attached) (*r*); and in the case of an attachment against the sheriff, you generally add the name of the cause thus: "*The Queen against the Sheriff of Middlesex, in a cause of J. N. against J. S.*;" though this is not, it seems, absolutely requisite (*s*).

Deponent's Abode. } The affidavit must state the true place of abode of the person making it (*t*), otherwise the court will not allow it to be used; or, in the case of an affidavit to hold to bail, will discharge the defendant on a common appearance (*u*). The deponent's addition, however, need not, it seems, be stated if he be a party in the cause, and describe himself as such, by the words, "the above-named plaintiff," or "above-named defendant," or the like (*x*). Where a deponent described himself as of "the city of London, merchant," it was holden to be sufficient (*y*); so, where he described himself as "of Bath, in the county of Somerset, Esquire" (*z*); or as "of Kennington, in the county of Surrey" (*a*); or as of "Lawrence Pountney, in the city of London" (*b*), without stating whether parish, place, or lane. So,

(*i*) *Ante*, Vol. I. p. 485.

(*j*) *Sowerby v. Woodruff*, 1 B. & Ald. 567; *Poole v. Robberds*, Id. 568, n.

(*k*) *Davis v. Stanbury*, 3 Dowl. 440; *Ex p. Gregory*, 8 B. & C. 409.

(*l*) *Thompson v. Vaux*, 5 Dowl. 691.

(*m*) *Bainbrigge v. Houlton*, 5 East, 21.

(*n*) *Bevan v. Bevan*, 3 T. R. 601; *In re Houghton*, 2 Moo. & P. 452.

(*o*) *Doe Clarke v. Stilwell*, 6 Dowl. 305.

(*p*) *Wood v. Webb*, 3 T. R. 253; *Ethrington v. Kemp*, 1 Chit. 727, n.

(*q*) *Whitehead v. Firth*, 12 East, 165.

(*r*) *Rex v. Sheriff of Middlesex*, 7 T. R. 439, 527; *Whitehead v. Firth*, 12 East, 165.

(*s*) *Rex v. Sheriff of Middlesex*, 5 B. & C. 389; 8 D. & R. 149, S. C.

(*t*) R. M., 15 C. 2: see 4 Taunt. 154.

(*u*) *Jarret v. Dillon*, 1 East, 18.

(*x*) *Angel v. Ihler*, 5 M. & W. 163;

Brooks v. Farlar, 5 Dowl. 361, C. P.;

Jackson v. Chard, 2 Dowl. 469, Q. B.;

Poole v. Pembrey, 1 Dowl. 693; 3 Tyr.

387. Fxch. S. C.: *Jerris v. Jones*, 4 Dowl.

610; 1 H. & W. 654; and see *Sharp v.*

Johnston, 2 Bing. N. C. 246; 2 Scott, 407;

4 Dowl. 324, S. C. *Lawson v. Case*, 1 C.

& M. 481, to the contrary, is a solitary

case, and clearly wrong.

(*y*) *Vassier v. Alderson*, 3 M. & Sel. 165.

(*z*) *Coppin v. Potter*, 4 Moo. & Scott,

272; 2 Dowl. 785.

(*a*) *Wilton v. Chambers*, 1 H. & W. 116;

and see *Hunt's bail*, 4 Dowl. 272; 1 H. &

W. 520, S. C.

(*b*) *Miller v. Miller*, 2 Scott, 117.

OK IV.
RT I.

where he described himself as "late of Tyrone, in the county of Tyrone, in Ireland, but now in Dublin Castle," it was deemed sufficient(c). And where a foreigner, who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient(d). So, where an attorney's clerk stated the place of business of his employer as his residence(e); so, where a clerk described himself of the office where he did business during the day, although he slept elsewhere at night(f); and where a person lately discharged from prison, but who slept there at night, described himself as late of that prison(g); the court held these to be sufficient descriptions of the deponent's place of abode, within the meaning of the rule of court above mentioned. And in an affidavit by an attorney's clerk it is enough to state his master's residence(h). But a deponent describing himself as "clerk to the defendant's attorney," without stating any residence, is insufficient(i). If the defendant be a prisoner in the custody of the sheriff(k), or in the Fleet, &c., merely describing as such will suffice; and this although when he made the affidavit he was out on a day rule(l). A deponent cannot describe himself as late of a place where he has ceased to reside, when he actually resides at another place at the time of making the affidavit(m). And where the deponent described himself as of "Dorset-place, Clapham-road, Middlesex," and his true place of residence was Dorset-place, Clapham-road, Surrey, it was holden bad(n). The court, however, have in some cases refused to try the real place of the deponent's abode upon affidavit(o).

Deponent's
Addition.

Deponent's Addition.] The rule of II. T., 2 W. 4, r. 5, requires that "the addition of every person making an affidavit shall be inserted therein." But the rule does not extend to an affidavit made by a party in the cause, if he describe himself as such, as by the words "the above-named plaintiff," or "the above-named defendant," or the like(p). Where, in an affidavit to found a motion, the addition of the deponent is omitted, the court will not inquire whether the facts sworn to by a deponent are sufficient to support the application(q). Merchant(r), and manufacturer(s), and "late clerk to," &c.(t), and "managing clerk to," &c.(u), and "agent and collector to A. B., (the plaintiff), an hotel-keeper"(v), have been considered sufficient(x). And an affidavit commencing "R. J., late of the city of W., victualler, but now of" &c.,

(c) *Steuart v. Gaverau*, 1 H. & W. 699.

(d) *Boutchet v. Kittoe*, 3 East, 154.

(e) *Alexander v. Milton*, 1 Dowl. 570; 2 C. & J. 424, S. C.: *Strike v. Blanchard*, 5 Dowl. 216.

(f) *Haslop v. Thorne*, 1 M. & Sel. 103; *Anon.*, 2 Chit. Rep. 15; *Alexander v. Milton*, 2 C. & J. 424.

(g) *Sedley v. White*, 11 East, 528.

(h) *Strike v. Blanchard*, 5 Dowl. 216; *Bottomby v. Bellchambers*, 4 Dowl. 26.

(i) *Daniels v. May*, 5 Dowl. 83; but see *Simpson v. Drummond*, 2 Dowl. 473; *Bottomby v. Bellchambers*, 4 Dowl. 26; 1 H. & W. 362, S. C.

(k) *Jervis v. Jones*, 1 H. & W. 654; 4 Dowl. 610, S. C.

(l) *Sharp v. Johnston*, 2 Bing. N. C.

246; 4 Dowl. 324, S. C.

(m) *Sedley v. White*, 11 East, 529.

(n) *Collins v. Goodger*, 4 D. & R. 44; 2 B. & C. 563, S. C.

(o) See Tidd, 9th ed. 179; 2 Smith, 207, S. C.: *Anon.*, 2 Leg. Obs. 382.

(p) *Ante*, 1211, n. (x).

(q) *Rex v. Justices of Carnarvon*, 5 Nev. & M. 364.

(r) *Vassier v. Alderson*, 3 M. & Sel. 165.

(s) *Smith v. Younger*, 3 B. & P. 550.

(t) *Simpson v. Drummond*, 2 Dowl. 473.

(u) *Per Littledale, J., Graves v. Brown*, 6 Ad. & Ell. 80.

(v) *Short v. Campbell*, 3 Dowl. 487.

(x) See Vol. I. 485; see *Anon.*, 6 Taunt. 73; and see the cases as to the description

without any further addition, has been held sufficient (*g*). But "assessor" is not a sufficient description (*z*). Nor is "acting as managing clerk to" &c. (*a*). An affidavit of merits to set aside an interlocutory judgment, or the like, must be made either by the party himself, or by his attorney in the cause, or by the managing clerk of the attorney, who has the management of that particular cause; and he must describe himself accordingly in the affidavit (*h*). In a joint affidavit, an objection to the description of one of the deponents does not render the statements of the others inadmissible (*c*).

It is not in general necessary to give any addition to any other party but the deponent (*d*). But the christian and surnames of parties ought in general to be inserted, if practicable (*e*).

CHAP. XXXVI.
Addition, &c.,
of other Parties.

Deponent's Signature.] Affidavits made in this country must be signed by the deponent. It is no objection to an affidavit that the signature is in a foreign character (*f*). An affidavit sworn before a judge in Germany and signed by the judge, but not by the deponent, has been held sufficient, it being sworn that such is the practice in Germany (*g*).

Deponent's
Signature.

Jurat.] The *jurat* is written at the foot of the affidavit, to the left of the page, in this form: "*Sworn at ———, this ——— day of ———, 1838, before me, ———.*" But if the affidavit be made by two or more persons, their names must be severally written in the *jurat* (*h*); and the form in that case will be thus: "*The above-named deponents, A. B. and C. D., were severally sworn at ———, this ——— day of ———, 1838, before me, ———.*" The time of swearing the affidavit must be stated in the *jurat* (*i*); and if sworn before a commissioner, the *jurat* should state the place where the affidavit was sworn (*k*), though the Court of Common Pleas have held that the omission is not material (*l*). If sworn abroad, the *jurat* must state the place at which it was sworn (*m*). Where no place was mentioned in the *jurat*, but the affidavit purported to be sworn before the Chief Justice of the King's Bench in Ireland, and to be signed by him, and the signature was verified here by affidavit, it was deemed sufficient to hold a defendant to bail under a judge's order (*n*). If the affidavit be sworn before a commissioner of the court, by a person who, from his signature,

Jurat.

of bail in the notice of bail, *ante*, Vol. I. 580.

(*g*) *Angel v. Ihler*, 5 M. & W. 163.

(*z*) *Nathan v. Cohen*, 3 Dowl. 370; 1 H. & W. 107, S. C.

(*a*) *Graves v. Browning*, 6 Ad. & El. 805.

(*b*) *Neesom v. Whytock*, 3 Taunt. 403; *R. v. Sheriff of Middlesex*, 1 Chit. 372.

(*c*) *Nathan v. Cohen*, 3 Dowl. 370; 1 H. & W. 107, S. C.; *Ex p. Edmonds*, 5 Dowl. 702; but see *R. v. Sheriffs of Carnarvon*, 5 Nev. & M. 364.

(*d*) See *Waters v. Joyce*, 1 D. & R. 150.

(*e*) See *Reynolds v. Hankin*, 4 B. & Ald. 536; but see *Howell v. Coleman*, 2 B. & P. 466.

(*f*) *Nathan v. Cohen*, 3 Dowl. 370.

(*g*) *In re Eady*, 6 Dowl. 615.

(*h*) *R. M.*, 37 G. 3, r. 1: 7 T. R. 82: *R. T.*, 1 G. 4, Exch.: 6 Bing. 236.

(*i*) *Doe v. Roe*, 1 Chit. Rep. 228: *Wood v. Stephens*, 3 Moore, 236.

(*k*) *MS.*, E. 1814, Q. B.: *Rex v. Cockshaw*, 2 Nev. & M. 378: *R. v. West Riding of Yorkshire*, 3 M. & Selw. 493: *Boyd v. Straker*, 7 Price, 662.

(*l*) *Symmers v. Wason*, 1 B. & P. 105.

(*m*) *Walker v. Christian*, *cor. Bosanquet*, J., at chambers, 3rd April, 1835, after consultation with other judges: also in another case on same day. In the first case the affidavit was sworn in the Indies, in the latter at Boulogne; but in neither case did the affidavit state it.

(*n*) *French v. Bellew*, 1 M. & Sel. 302.

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appears to be illiterate, such commissioner shall certify in the *jurat* that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and that the party wrote his signature in the presence of the commissioner (*o*); but if sworn before a judge, or in court, this is unnecessary. When an affidavit is made by a foreigner in the English language, an interpreter must be sworn by the officer taking the affidavit to interpret it truly, and the *jurat* should state that the interpreter was so sworn, and did interpret the affidavit. It is not, however, necessary that any affidavit should be made by the interpreter, or the officer taking the affidavit; it is sufficient that the latter certifies by the *jurat* that such steps were taken (*p*). If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character; and there is no statement in the *jurat* to shew that the defendant is a foreigner, and that the writing in question is his signature (*q*). In the case also of an affidavit made by a marksman, it is sufficient for the officer making the *jurat* to certify thereon, that it was read over to the deponent, and seemed to be understood by him, without the officers making an affidavit. If the affidavit be in a foreign language, there must be another affidavit by an interpreter as to its translation and meaning (*r*). Also, if sworn before a commissioner, it should appear that the person before whom it is sworn is a commissioner of the court (*s*); although, perhaps, this would not be considered material, if the affidavit be intitled in the court in which it is used, and the commissioner be in fact a commissioner of the court (*t*). But in a case in the Common Pleas, it was held that an affidavit of debt sworn before a commissioner in the country, without stating him to be a commissioner in the *jurat*, is insufficient, although intitled in the court (*u*). The *jurat* of an affidavit sworn before a commissioner, stating it to have been received "by virtue of a commission forth," &c., omitting the word "issued" is sufficient (*v*).

Erasure or
Interlineation
in Jurat.

The rule of *M. T.*, 37 *Geo.* 3, (7 *T. R.*, 82, *Q. B.*), provides "that no affidavit be read or made use of in any matter depending in this court, in the *jurat* of which there shall be any interlineation or erasure." A line drawn through two words in the *jurat*, leaving them, however, perfectly legible, is an erasure within this rule, and vitiates the affidavit, though the omission or retention of the words would not vary the sense (*x*). But the alteration of a figure in the date of an affidavit in the *jurat*, by writing one figure over

(*o*) *R. E.*, 31 *G.* 3, *Q. B.*: 4 *T. R.* 284: *R. T.*, 1 *G.* 4, *Exch.*: see *Haynes v. Powell*, 3 *Dowl.* 599; 1 *Chit. Rep.* 660. It must be read over and explained by the commissioner, and not by a third party. (*R. v. Sheriff of Middlesex in Disney v. Anthony*, 4 *Dowl.* 765). See the form, *Chit. Forms*, 207.

(*p*) *Bosc v. Solliers*, 6 *D.* & *R.* 514; 4 *B.* & *C.* 358, *S. C.*: and see *Marzetti v. Jouffroy*, 1 *Dowl.* 41.

(*q*) *Nathan v. Cohen*, 3 *Dowl.* 370.

(*r*) It is no objection to an affidavit sworn before a foreign court, that it was taken in the foreign language, if trans-

lated, and the translation verified; and the oath may be administered in the foreign language if it be translated by an interpreter to the deponent. (*In re Eady*, 6 *Dowl.* 615).

(*s*) *Rex v. Hare*, 13 *East*, 189.

(*t*) See *Kennet Canal Company v. Jones*, 7 *T. R.* 451; *R. T.*, 3 *W.* & *M.*: *Sharpe v. Johnson*, 4 *Dowl.* 324.

(*u*) *Howard v. Brown*, 1 *Moo.* & *P.* 22; 4 *Bing.* 393, *S. C.*

(*v*) *Daly v. Mahon*, 6 *Dowl.* 192.

(*x*) *Williams v. Clough*, 1 *Adol.* & *El.* 376; see *Houlden v. Fassen*, 6 *Bing.* 236; 4 *Moo.* & *P.* 127, *S. C.*

another, is not an erasure or interlineation within the rule (*y*). And if the words "before me" in the *jurat* are struck out, and the words "by the court" introduced, it is not, it seems, within the rule (*z*). An erasure over the *jurat* does not vitiate it (*a*). CHAP. XXXVI.

In general, time will not be given to cure a defect in the *jurat* (*b*). Where, however, the names of the deponents were omitted in the *jurat*, through the inadvertence of the judge's clerk, an amendment was allowed (*c*). Amendment of Jurat.

Before whom to be Sworn. Affidavits intended to be used in the course of any proceedings in the superior courts must be sworn either in the court in which the proceeding is pending, or before one of the judges sitting at *Nisi Prius* (*d*), or at chambers (*e*), or before a commissioner of the court authorized to take affidavits by stat. 29, C. 2, c. 5 (*f*); or before a commissioner empowered to take affidavits in Scotland or Ireland, by the stat. 3 & 4 W. 4, c. 42, s. 42 (*post*, 1216); or, in case of an affidavit to hold to bail, (prior to 1 & 2 P. c. 110), before the officer who issued the process, or his deputy (*g*). It has been held, that, since the 11 G. 4 & 1 W. 4, c. 70, s. 4, it is no objection to an affidavit to ground an attachment against a witness for contempt, that it is sworn before a judge of a different court from that to which the contempt was shewn (*h*). Before whom to be sworn.
Before Judge, Commissioner, &c.

A commission to take affidavits does not authorize the commissioner to administer an oath for the *vivâ voce* examination of a witness before an arbitrator (*i*).

By a general rule of all the courts of *H. T.*, 2 W. 4, r. 1, s. 3, "no affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney, or his clerk." Also affidavits sworn before the attorney or solicitor in a cause cannot be read (*k*), and this rule extends to affidavits taken before attornies, as commissioners, in causes wherein they are concerned for the parties in whose behalf such affidavits are made, except where they are made for the purpose of holding the defendant to bail (*l*). And an affidavit made before a commissioner, who acts as the attorney of the defendant *before* an appearance is entered, cannot be used, for he is within the limit of the rule as the attorney on the record (*m*); but it must be clearly shewn that he acted as such attorney at the time of taking the affidavit, and it is not sufficient to shew that he is so at the time of making the objection (*n*). The statement of a party that a particular person is his attorney, is sufficient evidence to Before Attorney in the Cause or his Clerk.

(*y*) *Jacob v. Hungate*, 3 Dowl. 456, Exch. any other of the courts, provided it be intitled in that other court.

(*z*) *Austin v. Grange*, 4 Dowl. 576.

(*a*) *Atkinson v. Thomson*, 2 Chit. Rep. 19: and see *Houlden v. Fassen*, 6 Bing. 236; 4 Moo. & P. 127, S. C. (*f*) See *Rez v. Jones*, 2 Salk. 461. The statute is extended to the Isle of Man by 6 Geo. 3, c. 50, s. 2.

(*b*) See *Anon.*, 2 Chit. Rep. 20. but see *Goodrick v. Furley*, 4 Dowl. 392. (*g*) 12 G. 1, c. 29, Vol. I. 496.

(*c*) *Ex p. Smith*, 2 Dowl. 607. (*h*) *Phillips v. Drake*, 2 Dowl. 45.

(*d*) *Rez v. Jolliffe*, 4 T. R. 235. (*i*) *Rez v. Hanks*, 3 Car. & P. 419, *per Gaselee, J.*

(*e*) It has been already noticed, (*ante*, 1208), that an affidavit sworn before a judge of the superior courts is receivable in the court to which he belongs, though not intitled; and that it is receivable in (*k*) R. E., 15 Geo. 2, r. 11, Q. B.: R. E. 13 Geo. 2, r. 1, C. P.

(*f*) *Goodtitle d. Pye v. Badtittle*, 8 T. R. 638.

(*g*) *Kidd v. Davis*, 5 Dowl. 568.

(*h*) *Beaumont v. Dean*, 4 Dowl. 354.

(*m*) *Beaumont v. Dean*, 4 Dowl. 354.

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invalidate the affidavit on this ground, though the fact is not positively sworn to (*o*). The rule which prevents the swearing of affidavits before the attorney or solicitor in the cause, did not formerly extend to the attorney's clerk (*p*). So, in the Common Pleas, if the agent in town were the attorney on record, it was no objection to an affidavit of the party, that it was sworn before his own attorney in the country (*q*). But now, by a general rule of all the courts of *H. T.*, 2 *W.* 4, *reg.* 1, *s.* 6, "where an agent in town, or an attorney in the country, is the attorney *on the record*, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail." An affidavit sworn before the clerk to an attorney, who makes an application that his client may be admitted as a party to a cause, is not within the prohibition of this rule (*r*).

Commission
for taking
Affidavits in
Scotland and
Ireland.

By the 3 & 4 *W.* 4, *c.* 42, *s.* 42, a power is given of granting commissions to take affidavits in Scotland and Ireland, to be used in the superior courts of common law and equity at Westminster. And the enactment, after reciting that "it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively should be extended," is as follows: "That the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, the said Courts of Law, and the several judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the Kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes now in force; and that all and every person and persons wilfully swearing or affirming falsely in any affidavit to be made before any person or persons who shall be so empowered to take affidavits under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open court in which such affidavit shall be intitled, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge."

Commissioner
not in Chief
Justice's List
insufficient.

Where it appeared from the affidavits that the defendant had been arrested for the amount of a bill of exchange, upon an affidavit made at *Athlone*, county of *Roscommon*, in *Ireland*, purporting to be sworn before a commissioner for taking affidavits for the Court of Common Pleas, in the

(*o*) *Haddock v. Williams*, 7 Dowl. 327.

(*p*) *Goodtitle d. Pye v. Badtittle*, 8 T. R. 633.

(*q*) *Read v. Cooper*, 5 Taunt. 89: and see

Williams v. Hockin, 8 Taunt. 435; *Tidd, Pract.*, 9th ed. 494.

(*r*) *Doe Grant v. Ree*, 5 Dowl. 409.

said county, and was signed "John Gaynor," who stated that he was not a commissioner for taking affidavits in the courts of *England*, but of *Ireland*; the court having referred to the Chief Justice's clerk's list of commissioners, wherein Mr. *Gaynor's* name was not found, discharged the defendant out of custody on entering a common appearance (*s*).

CHAP. XXXVI.

It has been made a question, but not decided, whether a British consul, or vice-consul, resident in a foreign country, has authority, by virtue of his office, to administer an oath for the purpose of holding a defendant to bail in this country (*t*). And it has been held in a late case that an affidavit of the verification of the certificate of the acknowledgment of a married woman under the Fines and Recoveries Act, the parties being resident in Germany, must be sworn before a native court, and an affidavit sworn before the British consul is not sufficient (*u*).

British Consul insufficient.

If an affidavit, intended to be used in the court, be sworn before a judge in Ireland or Scotland, the judge's signature to the *jurat* must be verified by an affidavit made in this country; but, if sworn before any other person, (except a commissioner authorized by the above act, 3 & 4 *W. 4*), or before any judge or other officer in a foreign country, not only his signature to the *jurat*, but also his authority to administer oaths and take affidavits, must be verified in like manner (*x*); or by the certificate of a notary public (*y*), or, it would seem, of a British consul (*z*). The Court of Exchequer in this country have, in several instances, allowed an affidavit sworn before a commissioner of the Court of Exchequer in Ireland, or a magistrate in Scotland, to be read (*a*).

Verification of Signature &c., where Affidavit sworn abroad.

When to be Sworn.] As to when affidavits in support of a rule must be sworn, see *ante*, 1185; against a rule, *ante*, 1191; on moving for new trial, *ante*, 1101; to hold to bail, *ante*, Vol. I. 485.

When to be sworn.

Where an application to the court is to be founded on an affidavit, such affidavit must be sworn and produced in court before the rule shall be drawn up, &c. (*b*).

When to be Filed.] Affidavits to hold to bail are filed at the time you sue out the process (*c*). As to filing affidavits on motions, see *ante*, 1185, 1191, 1194. By rule of all the courts of *H. T.*, 1 *Vict.*, it is ordered, "that all affidavits read before a judge of any of the said courts, or before a

When to filed.

(*s*) *Sharp v. Johnston*, 4 Dowl. 324; 2 Bing. N. C. 246; 2 Scott, 405; 1 Hodges, 298; 11 Leg. Obs. 117, 118, S. C.; and see *Wranglen v. Frowd*, 11 Leg. Obs. 261.

(*t*) *Pickardo v. Machado*, 4 B. & C. 886; 7 D. & R. 478, S. C.; *Ex p. Lady Hutchinson*, 1 Moo. & P. 559; 4 Bing. 606, S. C.; *Riddell v. Nash*, 8 Moore, 632.

(*u*) *In re Eady*, 6 Dowl. 615; see *Riddell v. Nash*, 8 Moore, 632. *In re Barber*, 4 Dowl. 640, seems from the marginal note to be an authority the other way, but the real point decided *In re Barber* seems to be merely that a consul may certify the handwriting and authority of the party taking the affidavit of acknowledgment,

and not that he may take the affidavit himself.

(*x*) See *Kench v. Belléw*, 1 M. & Sel. 302; *O'Mealy v. Newell*, 8 East, 364; *Dalmer v. Barnard*, 7 T. R. 251; *Ex p. Worsley*, 2 H. Bl. 275; *Pickardo v. Machado*, 4 B. & C. 886; 7 D. & R. 478, S. C.

(*y*) *Ex p. Worsley*, 2 H. Bl. 275.

(*z*) See *In re Barber*, 4 Dowl. 640, *per Tindal*, C. J.; and *quære* as to the marginal note?

(*a*) *Kilby v. Stanton*, 2 Y. & J. 75; *Ellis v. Sinclair*, 3 Y. & J. 273; *Watson v. Williamson*, 1 Dowl. 607.

(*b*) R. H., 36 G. 3, r. 1: *ante*, 1185.

(*c*) See Vol. I. 520.

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master of the same, shall be filed with the masters of the said courts, and be alphabetically indexed. Such affidavit to be delivered to the said masters, in order to be filed, four times in the year; that is to say, the last day of each term." In all other cases, if the affidavit be sworn in town, they must be filed with the masters, as soon as used, whether the motion be granted or not, in order that they may be given in evidence, if necessary, on an indictment for perjury (*d*); but if sworn before a commissioner, in strictness they should be first filed with the masters, and then copies taken of them, for the purpose of being used in court (*e*), which, however, is not attended to in practice. Affidavits used before the master on taxation of costs cannot be read on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is not sufficient (*f*). If the opposite attorney, on demand made, refuse to file the affidavits, or give a copy of them, the court will interfere and compel him (*g*). Affidavits, when once filed, may be made use of by the opposite party, though the party who filed them may decline to use them (*h*).

Where Time
limited by
Rule.

Also, as we have seen *ante*, 1191, 1192, in all cases where a special time is limited in any rule, before which time an affidavit is required to be filed, no affidavit filed after that time shall be made use of in court, or before the master, unless it shall appear to the satisfaction of the court that the filing of such affidavit within the time limited was prevented by inevitable accident.

Affidavits
sworn in the
Country may
be used with-
out taking
Copies.

By rule of all the courts of *H. T.*, 1 *Vict.*, it is ordered, "that on and after the fourth day of the present Hilary term, all affidavits sworn before a commissioner in the country, or a judge of assizes on the circuit, be read in the several Courts of Queen's Bench, Common Pleas, and Exchequer, or before any judge of the same, or any of the masters thereof, in like manner as other affidavits, and without obliging the parties filing them to obtain copies of the same."

How long in
Force.

How long in Force.] Age is, in general, no objection to an affidavit (*i*), unless the case is one in which the lapse of time affects the matters contained in it; as in the case of an affidavit of debt, which is only good for a year, it being presumed after that period that the debt is paid (*j*).

Defects, when
aided, amend-
ed, &c.

Defects, when Aided, Amended, &c.] Defects in affidavits are very rarely aided; and, if defective, time is seldom granted to cure the defect, except in some cases in the justification of bail. In the case of affidavits to hold to bail, defects are waived in general after the expiration of eight days from the arrest (*Vol. I.* 503); but they cannot in any case be remedied by a supplementary affidavit. (*Id.* 502). An affidavit cannot be made use of if altered after it is sworn (*k*).

(*d*) *Rex v. Crossley*, 7 *T. R.* 315; *Johns v. Mills*, 14th Nov. 1832; *K. B. MS.*; 1 *Dowl.* 510, *S. C.*; *Ex p. Dicas*, 2 *Dowl.* 92; *Ex p. Elderton*, *Id.* 568.

(*e*) 29 *C. 2*, c. 2; *R. M.*, 9 *G. 2*.

(*f*) *Cliffe v. Rosser*, 2 *Dowl.* 21.

(*g*) *Ex p. Dicas*, 2 *Dowl.* 92.

(*h*) *Price v. Hayman*, 7 *Dowl.* 47.

(*i*) *Doe Clarke v. Stilwell*, 3 *Nev. & P.* 701; but see *Burt v. Owen*, 1 *Dowl.* 691.

(*j*) *Ante*, *Vol. I.* 497.

(*k*) *Wright v. Skinner*, 5 *Dowl.* 92.

Appearing and using affidavits in opposition to a rule do not waive an objection to the title of the affidavit on which the rule was moved (*l*). Two months delay in making an objection is no waiver of it (*m*). Where a rule has been obtained on an affidavit, which is defective in not having a proper *jurat*, the party moving cannot, when cause is shewn, and the objection taken, remove the effect of it by producing a fresh affidavit similar to the first, with a proper *jurat*: the proper way is to re-swear the original affidavit, and the court will enlarge the rule for that purpose, or allow the new affidavit to be filed (*n*). Where a motion for a rule *nisi* is made upon certain affidavits, the party will not be allowed afterwards, when cause is shewn, to make use of any other affidavits made subsequently, at least without the leave of the court, unless such additional affidavits be merely confirmatory of what was already sworn when the rule *nisi* was made (*o*); nor will he be allowed to make use of any other affidavits, made previously in the same cause, and already on the files of the court, unless they be expressly specified in the rule *nisi* (*p*). If there is a defect in intitling affidavits produced in shewing cause against a rule, the court will sometimes allow the rule to be enlarged, in order that the title may be amended (*q*). In a recent case, the court refused to allow the title in the affidavit to be amended (*r*). See further as to the amending an affidavit, *ante*, 1136, 1137. If the affidavit be sworn before a party having no authority to receive it, it will be a nullity. It seems that where a rule is discharged on a technical objection taken to an affidavit, without going into the merits, no costs are allowed (*s*).

(*l*) *Clothier v. Ess*, 3 Moo. & Scott, 216; 2 Dowl. 731, S. C.: see *Levy v. Duncombe*, 3 Dowl. 447.

(*m*) *Sharp v. Johnston*, 4 Dowl. 324.

(*n*) *Goodricke v. Furley*, 4 Dowl. 392; *R. v. Justices of Warwick*, 5 Dowl. 382: but see *R. v. Cockshaw*, 2 Nev. & M. 278.

(*o*) See *ante*, 1185, 1191: *Solloway v. Whorewood*, 2 Salk. 461.

(*p*) *Per Bayley, J.*, MS., E. 1824: and see *Quelle v. Boucher*, 1 Scott, 283; 3 Dowl. 107, S. C.

(*q*) *Anderson v. Ell*, 3 Dowl. 73.

(*r*) *Phillips v. Hutchinson*, 3 Dowl. 20.

(*s*) *Preedy v. Lovell*, 4 Dowl. 671, Exch.: *Harris v. Matthews*, 4 Dowl. 608; but see *Houlditch v. Swinfen*, 5 Dowl. 36.

BOOK IV.

PART II.

ARBITRATION.

- SECT. 1. *The Reference*, 1220 to 1227.
 2. *The Award*, &c., 1227 to 1239.
 3. *Setting aside the Award*, 1239 to 1254.
 4. *Enforcing Performance of Award*, 1255 to 1261.

SECT. 1.

The Reference.

<i>Where there is a Cause in Court</i> , 1220.	<i>Revocation of Submission</i> , &c., 1225.
<i>Where there is no Cause in Court</i> , 1222.	<i>Effect of Agreement to refer on Right to Sue</i> , 1227.
<i>Alteration of Submission</i> , 1124.	

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PART II.

Where there
is a Cause in
Court.

Where there is a Cause in Court.] WHERE the matter intended to be submitted to arbitration is also the subject of an action pending in one of the superior courts at Westminster, if the defendant has been holden to bail, it is usual to wait until the cause shall be called on at *Nisi Prius*, and then take a verdict for the damages stated in the declaration, subject to the award of the person to whom the cause is to be referred: otherwise, the reference to arbitration would be a discharge of the bail (a). But if the defendant have not been holden to bail, then the cause may be referred, at any time before trial, by judge's order or rule of court; or, when the cause is called on, by order of *Nisi Prius*, with or without a verdict being taken, as the parties shall judge proper.

(a) Vol. I. 634: 2 Saund. 72 b.

Where an attorney agreed to refer a cause at *Nisi Prius*, without the consent or knowledge of his client, the court refused to set aside the rule of reference on that account, even although the application for that purpose was made previously to any proceedings being had before the arbitrator (*b*). But it would seem that a client would not be bound by his attorney's unauthorized agreement to refer a cause in an unusual manner (*c*).

SECT. 1.

Attorney has Power to refer.

If the cause be referred at *Nisi Prius*, the leading counsel for both parties fix upon the arbitrator, indorse their briefs accordingly, and hand them to the clerk of *Nisi Prius*, or associate, in order that he may draw up the order of *Nisi Prius* from them (*d*). But if the cause is to be referred before trial, then let each party get a motion-paper to that effect signed by counsel; take them to one of the masters, and draw up the rule (*e*). Or, by the attorneys on both sides signing a consent, they may thereupon obtain a judge's order to the same effect (*f*). After obtaining the rule or order, you proceed as is directed in the next Section. The rule should order that all proceedings in the action be stayed, otherwise it will not operate as a stay of proceedings (*g*). It may be here observed, that a judge's order for this purpose may be made a rule of court, even after revocation, with a view to costs (*h*).

Rule or Order of Reference, how obtained.

Where all matters in difference in the cause were agreed to be referred, and the associate, by mistake, drew up the order of reference generally, as to all matters in difference between the parties, the court refused to amend it, and said that the order of reference must be considered as a mere nullity, and the parties must go down again to trial (*i*). And, on the other hand, an order of *Nisi Prius* was refused to be amended, according to the terms of a paper signed by counsel at the trial, the intention of the parties appearing, from their subsequent acts, to be in favour of the terms of the order (*k*).

Amendment of Order of Reference.

Where a cause was referred at *Nisi Prius*, and a verdict taken subject to the award of a barrister as to the damages; the barrister afterwards declined proceeding in the reference, on the ground that his opinion had been previously taken by one of the parties relative to the matter in dispute; and the defendant thereupon refused to join in naming another arbitrator, insisting upon the matter being submitted to a jury: the court, upon application, ordered, that, unless the defendant would consent to refer the damages to another arbitrator, judgment should be entered up, and execution issued for the damages given by the verdict (*l*). But where the arbitrator died, and another was substituted by consent but afterwards objected to, the court held that the death of the arbitrator without making his award had the effect of

Substitution of Arbitrator when first unable to proceed.

(b) *Filmer v. Delmer*, 3 Taunt. 486: see *Biddell v. Dowse*, 6 B. & C. 255: see Vol. I. 69.

(c) See *Iveson v. Carrington*, 2 D. & R. 207; 1 B. & C. 160, S. C.

(d) See form of order, Chit. Forms, 656.

(e) See form of rule, Chit. Forms, 658.

(f) See form of order, Chit. Forms, 660.

(g) R. T., 1 Anne, 2 I.d. Raym. 789.

(h) *Aston v. George*, 2 B. & A. 395: see *Gloster v. Honan*, 1 Jones, Rep. Exch. Ir. 269.

(i) *Rawtree v. King*, 5 Moore, 167.

(k) *Pearman v. Carter*, 2 Chit. 29.

(l) *Woolley v. Clark*, 2 D. & R. 158; 1 B. & C. (8), S. C.: see *Kirkus v. Hodgson*, 8 Taunt. 733; 3 Moore, 64, S. C.

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PART II.Award as to
Cause cannot
exceed Da-
mages laid in
Declaration.

opening the cause, and that it might be re-tried(*m*). See further as to this, *post*, 1233.

It may be necessary to mention in this place, that the arbitrator cannot (as far as relates to the action referred) award the payment of a greater sum than is laid as damages in the declaration; nor will the court, after a verdict taken as above mentioned, allow the declaration to be amended, so as to enlarge these damages, even upon affidavit that a greater debt can be proved before the arbitrator(*n*). But judgment may be entered up for the amount of the verdict or damages laid; and if it be entered up for the greater sum, it may be amended(*o*).

Where there
is no Cause in
Court.

Where there is no Cause in Court.] Matters in difference between parties, which are not the subject of any action pending at the time, may be referred to arbitration in any of the three following ways:—1st, By mutual bonds or other deed or written agreement of submission, merely; 2ndly, By such bonds, deed, or agreement, containing also the parties' assent that such submission shall be made a rule of court(*p*); and, 3rdly, By parol agreement; in which case, however, the submission cannot be made a rule of court, even although the parties consent to it(*q*). It is sometimes prudent to take a warrant of attorney as a collateral security to compel performance of an award; as, for instance, in the submission of the title to land; for if a party in possession be awarded to deliver possession of land to the other, the only mode by which the party can obtain possession is by ejectment; whereas, a warrant of attorney to confess judgment in ejectment with a defeazance, that no execution should be taken out, unless the arbitrator should, by his award, direct the defendant to yield possession, and he should neglect to do so on or before the day appointed by the award, would obviate the necessity of an ejectment in such cases, and would not put the opposite party in any worse condition(*r*). The submission, if by deed, should be executed by the parties themselves, and not by their attorneys, unless by virtue of a power of attorney.

Warrant of
Attorney.Submission
by Person
without Au-
thority, &c.

Even one of two or more partners cannot bind the others by a submission to arbitration of matters arising out of the business of the firm(*s*), without a power of attorney authorizing him to do so. And where a person signed a submission as attorney for another without a power authorizing him to do so, and the arbitrator awarded that the attorney should pay a sum of money, the court held that the attorney should perform the award, and that his principal was not bound by the submission(*t*). Also, where two persons bound themselves *jointly* and severally to perform an award, and the arbitrator awarded a sum to be paid by each,

(*m*) *Harper v. Abrahams*, 4 Moore, 3. As to the necessity of getting rid of the former verdict before re-trying, see *Hall v. Rouse*, 4 M. & W. 24; 6 Dowl. 656, S. C.

(*n*) *Pearse v. Cameron*, 1 M. & Sel. 675; *Prentice v. Reed*, 1 Taunt. 151.

(*o*) *Id.*

(*p*) 9 & 10 W. 3, c. 15, s. 1. See form of bond, Chit. Forms, 661.

(*q*) *Ansell v. Evans*, 7 T. R. 1; *Godfrey*

v. Wade, 6 Moore, 483.

(*r*) Bythewood's Conveyancing, Vol. 2, p. 639.

(*s*) *Stead v. Salt*, 10 Moore, 389; 3 Bing. 101, S. C.; *Adams v. Bunkart*, 1 C., M. & R. 681; 1 Gale, 48, S. C.; see *Barnell v. Minot*, 4 Moore, 340.

(*t*) *Bacon v. Dubarry*, 1 Ld. Raym. 246; 1 Salk. 70, S. C.

the court held that both were jointly liable for each of the sums so awarded (*u*).

SECT. I.

Where several underwriters on a policy agreed to refer the demand of the assured, it was holden that, as they had a community of interest in the subject of the insurance, and were all underwriters on the same policy, one stamp for the submission and one stamp for the award were sufficient (*r*).

Several Stamps, when required.

The submission, in order that it may be made a rule of court pursuant to a clause of consent for that purpose, (*post*, 1124), under stat. 9 & 10 *H. 3, c. 15, s. 2* (*r*), must be in writing, for a parol submission cannot be made a rule of court, even by consent (*y*); also, it must be of some controversy or suit, "for which there is no other remedy but by personal action or suit in equity." Therefore, the court have refused to make a submission a rule of court, where part of the matter agreed to be referred (namely, an assault) had been made the subject of an indictment (*z*). It has been holden that the right of real property cannot pass by mere award (*a*); but it is clear that a conveyance or release of land may be awarded, if within the terms of the submission (*b*).

What Submission may be made a Rule of Court.

The submission should distinctly specify the matter of controversy submitted; or, if stated generally, it should be "of all matters in difference between the parties." Where an action is pending, it may be "of all matters in dispute in the cause between the parties," or "of all matters in dispute between the parties in the cause" (*c*); the former confining the submission to the matter of the suit then pending (*d*), the latter extending it to all matters in difference; and the costs being to abide the event makes no difference (*e*). It is now more usual, in case of a general reference, to use the phrase "of all matters in difference between the parties," and "of all matters in difference in the cause," where the

Form of Submission, and what it includes.

(*u*) *Mansell v. Burrige*, 7 T. R. 352; see *Barnes*, 55.

(*v*) *Goodson v. Forbes*, 1 Marsh. 525; 6 Taunt. 171, S. C.

(*x*) That section enacts that "it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit or quarrel, controversies, suits or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witness thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage

which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption, or other undue means."

(*y*) *Ansell v. Evans*, 7 T. R. 1.

(*z*) *Watson v. M'Cullum*, 8 T. R. 520; see *R. v. Cotesbatch*, 2 D. & R. 265; *R. v. Bardell*, 1 Nev. & P. 74; but see *Baker v. Townsend*, 7 Taunt. 422; 1 Moore, 120, 287.

(*a*) 1 Ro. Abr. 242: *Marks v. Marriot*, 1 Ld. Raym. 115.

(*b*) Bl. Com. 16.

(*c*) *Smith v. Muller*, 3 T. R. 626.

(*d*) *Malcolm v. Fullarton*, 2 T. R. 644.

(*e*) *Id.* 645; 2 Saund. 64, (7).

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action alone is referred. It has been holden, that a reference "of all matters in difference between the parties" does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of the reference, if such matter were not a matter in difference between the parties, nor laid before the arbitrator (*g*); but, in a case where the reference was "of all actions and causes of actions between the parties," and, after the award made, the party thereby ordered to pay a sum of money wished to deduct from it a sum due to him by the opposite party, and which had not been under the consideration of the arbitrators, the court held that he could not do so; for the rule of reference was large enough to include that transaction, and it should have been discussed before the arbitrator (*h*). A submission to arbitration by an executor or administrator is not of itself an admission of assets (*i*); but it impliedly includes in it a submission of the question whether the executor have assets; and if the arbitrator award that he shall pay a sum of money, this is virtually an award that he has assets to that amount, and he must pay it (*k*). Where a verdict is taken subject to an award or certificate on the cause, and all matters in difference, the arbitrator is in the place of a jury, and, therefore, should find for the defendant only on the issues proved by him, though by the terms of the submission, if nothing be found due to the plaintiff, a verdict is to be entered for the defendant (*l*).

Clause of
Consent to
make Sub-
mission a
Rule of
Court.

The clause of consent in the submission that it shall be made a rule of court may be to this effect: that the parties do thereby "consent and agree that this their submission to the arbitration or umpirage above mentioned shall be made a rule of her majesty's Court of Queen's Bench at Westminster, pursuant to the statute in such case made and provided." Where this clause mentioned only "the court," without stating which court, the Court of Common Pleas allowed the submission to be made a rule of that court (*m*). And where the consent was, that the "award" instead of the "submission" should be made a rule of court, the court held the mistake to be immaterial (*n*). Also, where the clause was conditional, thus: "And *if* the obligor shall consent that this submission be made a rule of court, that then" &c., the court held it to be sufficient (*o*). It seems, that the act only authorizes making the submission a rule of one court, and not of more than one (*p*).

Alteration of
Submission,
&c.

Alteration of Submission.] After a submission by deed, a new arbitrator may be substituted in the place of one of the original arbitrators, by consent of both parties without deed,

(*g*) *Rance v. Farmer*, 4 T. R. 146; *Thorpe v. Cooper*, 5 Bing. 129; 2 Moo. & P. 245, S. C.: *Seddon v. Tutop*, 6 T. R. 607.

(*h*) *Smith v. Johnson*, 15 East, 213; *Dunn v. Murray*, 9 B. & C. 780: and see *Martin v. Thornton*, 4 Esp. 180; *Shelling v. Farmer*, 1 Str. 646.

(*i*) *Pearson v. Henry*, 5 T. R. 6.

(*k*) *Worthington v. Barlow*, 7 T. R. 453; *Barry v. Rush*, 1 Id. 691.

(*l*) *Woolfe v. Cooper*, 6 Dowl. 617; 4 Bing. N. C. 449, S. C.

(*m*) *Soilleu c. v. Herbst*, 2 B. & P. 444.

(*n*) *Pedley v. Westmacott*, 3 East, 603; *Ex p. Storey*, 2 Nev. & P. 607; 7 Ad. & J.L. 602: overruling *Harrison v. Grundy*, 2 Str. 1178, *contra*.

(*o*) *Cheesty v. Baily*, 1 Ld. Raym. 674; 1 Salk. 72, S. C. See Chit. Forms, 660, 662.

(*p*) *Winpenny v. Bates*, 2 C. & J. 379.

and such appointment constitutes a new submission, not under seal, incorporating all the remaining provisions of the former submission (q). The remedy by action on the deed of submission would, however, be lost unless the substitution were also by deed (r). And a recognisance to perform the award of B. is not forfeited by non-performance of the award of C., who by consent of the parties is substituted for B., by rule of court (s). The remedy in such cases is by attachment, or action on the award (t). The same principles seem to be applicable to other alterations. As to amendment of a submission by rule of court, see *ante*, 1221.

Revocation of Submission, &c.] After entering into the submission, and consenting that it should be made a rule of court, either party, before the act of 3 & 4 W. 4, c. 42, might *revoke* his submission by deed, at any time before the making of the award, and before the submission had actually been made a rule of court: and this, though the cause was referred by order of *Nisi Prius* (u); and if the arbitrator had afterwards proceeded and made his award, notwithstanding the revocation, the party would not have been liable to an attachment for a non-performance of it, (particularly if the arbitrator had had notice of the revocation before the award was made) (x), and the court upon application would have set it aside (y); and could not have vacated the revocation (z). Where, indeed, it appeared doubtful whether the arbitrators had made their award previous or subsequent to their receiving notice of a deed of revocation, the Court of Common Pleas would not stay the proceedings, but left the party to plead such matter *prois darrein continuance* (a). The bond of submission, however, became forfeited by such revocation, and the obligee might immediately have sued upon it (b); or the court might, upon the rule; or upon the judge's order being made a rule of court (c), have ordered the party revoking to pay the other "such costs as the court shall think reasonable and just," according to the terms of the rule or order (d). Where it appeared that the arbitrator's authority had been revoked merely on the ground that the party could not procure the attendance of a material witness before the arbitrator, the court refused to make him pay costs (e). But now, by the 3 & 4 W. 4, c. 42, s. 39, it is enacted, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to

Revocation
of Submis-
sion, &c.

By Leave of
the Court.

(q) *Re Tunno*, 2 Nev. & M. 328.
(r) *Brown v. Goodman*, 3 T. R., 592:
post, 1255.

(s) *R. v. Bingham*, 3 Y. & J. 101.
(t) *Evans v. Thompson*, 5 East, 189:
Re Tunno, 2 Nev. & M. 328.

(u) See *Rex v. Burridge*, 1 Str. 593:
and see *Lowes v. Kermod*, 2 Moore, 38;
3 Taunt. 146. S. C.: *Green v. Pole*, 6
Bing. 443; 4 Moo. & P. 198, S. C.

(x) *Milne v. Gratrix*, 7 East, 608: *King
v. Joseph*, 5 Taunt. 452.

(y) *Clapham v. Higham*, 7 Moore, 703;

1 Bing. 87, S. C.

(z) *Skee v. Coxon*, 10 B. & C. 483.

(a) *Lowes v. Kermod*, 2 Moore, 30; 8
Taunt. 146, S. C.: and see *Dicas v. Jay*,
6 Bing. 519; 2 Moo. & P. 448, S. C.

(b) *Warburton v. Storr*, 4 B. & C. 103.

(c) See *Aston v. George*, 2 B. & Ald.
395; 1 Chit. Rep. 200, S. C.

(d) See *Skee v. Coxon*, 10 B. & C. 483:
Morgan v. Williams, 2 Dowl. 123.

(e) *Aston v. George*, 2 B. & Ald. 395; 1
Chit. Rep. 200, S. C.

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reference containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be *revocable by any party* to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the term (*f*) for any such arbitrator making his award" (*g*). It has been decided on this statute, that the court, or a judge, cannot make a rule or order for revoking the arbitrator's authority without hearing both parties; and a judge's order of revocation, made *ex parte*, was rescinded by the court (*h*). The statute applies to references of civil proceedings only (*i*). To bring a case within the act, the reference must be *complete*, therefore the act does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed (*k*). The court cannot give leave to revoke the authority of an arbitrator after he has made an award (*l*); but they may, of course, set aside the award, if there be grounds for it.

Revocat'on
by Death or
Bankruptcy.

Besides this mode of revocation already mentioned, the authority of the arbitrator may be impliedly revoked by the *death* of either party, or of only one of several parties, before the award is actually made (*m*), unless the submission contains an express stipulation to the contrary (*n*); and such a stipulation may be inserted with effect in an order of reference or rule of court (*o*). Even where a verdict is taken subject to the award, the death of a party after verdict, and before award made, is a revocation (*p*); unless, indeed, the submission expressly or impliedly provide the contrary (*q*). And where differences arose between the owners of a ship and the freighters, (the latter having distinct interests in the cargo), and it was agreed between them that the matters in difference should be referred to arbitration, it was holden, that the death of one of the freighters before award made only affected the award as to him, and was no revocation as

(*f*) See *post*, 1231.

(*g*) See form of order permitting revocation, Chit. Forms, 664, 627; and order, &c., for enlarging the term, *Id.* 668.

(*h*) *Clarke v. Stocken*, 2 Bing. N. C. 651; 3 Scott, 90; 5 Dowl. 32; 2 Hodges, 1, S. C.

(*i*) *Rez v. Bardell*, 1 Nev. & P. 74; 5 Dowl. 238; 5 Ad. & Ell. 619, S. C.

(*k*) *Bright v. Downell*, 4 Dowl. 756; 1 T. & G. 576, S. C.

(*l*) *Phipps v. Ingram*, 3 Dowl. 669.

(*m*) *Cooper v. Johnson*, 2 B. & Ald. 394; and see *Bristow v. Binns*, 3 D. & R. 184; *Lowes v. Kermode*, 2 Moore, 30; 8 Taunt. 146, S. C.; *Dowse v. Core*, 10 Moore, 272; 3 Bing. 20, S. C.; *Edmunds v. Cox*, 2 Chit. Rep. 432.

(*n*) See *Biddell v. Dowse*, 6 B. & C. 255; *Clarke v. Crofts*, 4 Bing. 143; 12 Moore, 349, S. C.

(*o*) *Macdougall v. Robertson*, 1 Moo. & P. 147; 2 Y. & J. 11, S. C.

(*p*) See *Toussaint v. Hartop*, 7 Taunt. 571; 1 Moore, 287; Holt, 335; *nom. Anon.*, 1 Chit. Rep. 187 n. a, S. C.; and see *Tyler v. Jones*, 4 D. & R. 740; 3 B. & C. 144, S. C.; *M'Dougall v. Robertson*, 2 Y. & J. 11; 1 Moo. & P. 147, S. C.; but see *Bowyer v. Taylor*, 3 D. & R. 610 a.

(*q*) *Toussaint v. Hartop*, 7 Taunt. 571; 1 Moore, 287, S. C.; and see *Biddell v. Dowse*, 6 B. & C. 255; *Clarke v. Crofts*, 12 Moore, 349; 4 Bing. 143, S. C.; *Wrightson v. Bywater*, 6 Dowl. 359.

to the others(*r*). The marriage of a feme sole party, after submission and before award made, is in like manner a revocation of the arbitrator's authority(*s*); but the bankruptcy of a plaintiff may not(*t*). Where the rights of the bankrupt having passed to his assignees, and the arbitrator having no power over the latter, there consequently remaining no mutuality, the bankruptcy was held a revocation(*u*).

Effect of Agreement to refer on Right to Sue.] An agreement to refer matters in difference to arbitration does not oust the courts of law or equity of their jurisdiction, and the party thereto may commence proceedings notwithstanding(*x*); though he might be subject to a cross action if he has refused to enter into such arbitration. And if a reference be pending, and it has been agreed that it shall operate as a stay of proceedings, it may be made the subject of an application to the court for staying the proceedings until an award is made(*y*).

SECT. 2.

The Award, &c.

Proceedings upon the Reference,
1227.
Award, 1230.
Enlargement of Time for making
it, 1231.

Umpire, 1234.
Costs, 1235.
Arbitrator's Authority, how de-
termined, 1239.

Proceedings upon the Reference.] It is usual to have those persons sworn who give evidence before the arbitrator. For this purpose, before the recent act of 3 & 4 W. 4, c. 42, if the cause was referred at *Nisi Prius*, and the witnesses were in court, each attorney wrote down the names of his witnesses, together with the name of the cause, upon a piece of paper, and gave it to the crier of the court, who would thereupon swear the witnesses(*z*). In other cases, the like memorandum was made, stating also whether the persons to be sworn were parties in the cause, or only witnesses. It was taken to the judge's chambers, or to the Court at Westminster, and the judge's clerk had the witnesses sworn, and gave a memorandum to that effect, signed by the judge. This course may still be pursued, but it is more usual to have the witnesses sworn before the arbitrator, under the 3 & 4 W. 4, c. 42, s. 41. By that enactment, it is provided, "that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the rule shall be made a rule of court, it shall be

Proceedings
upon the Re-
ference.
Swearing
Witnesses.

(*r*) *Per* three Justices, MS., H. 1820.
(*s*) *Charnley v. Winstanley*, 5 East, 266: 139: *Hill v. Hollister*, 1 Wils. 129: *Tattersall v. Groote*, 2 B. & P. 131: *Street v. Rigby*, 6 Ves. jun. 815.
(*t*) *Andrews v. Palmer*, 4 B. & Ald. 250: *Snook v. Heltzer*, 2 Chit. 43: but see
(*y*) *Ante*, 998.
(*u*) *Marsh v. Wood*, 9 B. & C. 659.
(*z*) See form of this memorandum for the jurat, Chit. Forms, 665.

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ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmations in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." A provision, in the order of reference, that the witnesses shall be examined upon oath, "to be taken before me" (the judge) "or some other judge of the Court of Exchequer, or before a commissioner," does not exclude the power of the arbitrator to administer an oath under this act (a). But the court or a judge have still a concurrent jurisdiction to swear witnesses examined before an arbitrator (b). If the witnesses or parties be examined without being sworn, yet, if no objection on that account be made before the arbitrator, the court will not set aside the award (c).

Obtaining
Appointment
for the Arbitrator.

The next step is to obtain an appointment from the arbitrator. If the cause have been referred at *Nisi Prius*, get the order of *Nisi Prius* from the associate, if the cause was tried at the assizes; or from the clerk of *Nisi Prius*, if it were tried in London or Middlesex. Then get an appointment in writing from the arbitrator, as to the time and place the parties and their witnesses are to attend before him (d); and make a copy of the order of *Nisi Prius* and appointment, and serve it on the opposite attorney: it is usual, also, at the same time, to inform him if you purpose attending by counsel. If the cause were referred by rule of court, draw up the rule with one of the masters; or, if by judge's order, draw up the order, as already mentioned; get an appointment from the arbitrator (d); and serve a copy of the rule or order and appointment, as above directed. In all other cases, a notice of the time and place appointed by the arbitrator will be sufficient. Care must be taken that it be ordered by the rule that all proceedings in the cause be stayed; otherwise the reference will be no stay of proceedings (e).

Statement of
Case, Wit-
nesses, &c.,
to.

Each party is next to furnish the arbitrator with a statement of his case, and a list of the witnesses he intends to produce. If briefs have been made out, and the arbitrator be a gentleman of the profession, this is usually done by delivering to him one of the briefs on each side.

Compelling
Attendance
of Witnesses.

Before the recent statute, there was no mode or power of compelling the attendance of a witness before an arbitrator, even where he had engaged to attend (f). But now, by the 3 & 4 W. 4, c. 42, s. 40, "when any reference has been made by any such rule or order, or by any submission containing such agreement as aforesaid (g), it shall be lawful for the court by which such rule or order shall be made, or which shall be

(a) *Hodgson v. Wise*, 4 M. & W. 536; 7 Dowl. 51, S. C.

(b) *James v. Atwood*, 5 Bing. N. C. 628.

(c) *Ridout v. Pye*, 1 B. & P. 91.

(d) See the form, Chit. Forms, 666.

(e) R. T., 1 Anne: 2 Ld. Raym. 789.

(f) *Wansall v. Southwood*, 4 M. & R. 359.

(g) *Ante*, 1224.

mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience of any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct-money, and payment of expenses, and for loss of time, as for and upon attendance at any trial; provided also, that the application made to such court or judge for such rule or order, shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found; provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order." Independently of this enactment, as to the production of documents, where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them, the court held that he could not, by *affidavit*, bring before the court the question, whether those books related to matters in difference between the parties or not, though it was expressly sworn that the books merely related to old accounts which had been long since settled, and which it had been agreed between them should form no part of the reference, because, by the general terms of the submission of all matters in difference, it was left to the discretion of the arbitrator to say what were matters in difference and what were not (h). *Where it is requisite to resort to the above compulsory proceeding, the course is for the attorney of the party desiring the attendance of the witness to lay before a judge at chambers a memorandum, signed by the attorney, stating the existence of the reference, that the witness or the production of the documents is material, and annexing or inserting a copy of the appointment of the arbitrator; and upon which the judge will make his order (i) for the attendance of the witness. Or a motion may be made to the court, and a rule obtained for the attendance of the witness and production of the document. An appointment in writing of the time and place of attendance, in obedience to the rule or order signed by the arbitrator, or, if more than one, by one at least of the arbitrators, should be obtained (i). A copy of the order or rule and appointment should then be served upon the witness, a reasonable time before that appointed for the attendance, the originals being at the same time shewn to him, and a sum sufficient for his expenses and loss of time being paid or tendered to him at the same time. If the witness do not*

(h) *Arbuckle v. Price*, 4 Dowl. 174.

(i) See Chit. Forms, 667.

BOOK IV.
PART II.The Hearing
and Examination of
Witnesses,
Parties, &c.

comply with the rule or order and appointment, he may be proceeded against as guilty of a contempt of court (*k*). In case of a reference at *Nisi Prius*, the witness will not be subject to an attachment, unless the order of *Nisi Prius* has been regularly drawn up (*l*).

At the time appointed, the arbitrator hears the parties, or their counsel or attornies, and hears the evidence, in the same order as at a trial at *Nisi Prius*. There is a clause, however, in the rule and order of reference, authorizing the arbitrator to examine the parties themselves, on oath, if he thinks fit; and this has been holden to empower him to examine the plaintiff to a point upon which no other evidence could be adduced on the other side (*m*). It is entirely in his discretion whether he will examine them or not (*n*). If the submission to arbitration be "so that the witnesses be examined on oath," affidavits cannot be read; and if they are, the award may be set aside (*o*). The mode of conducting the reference must in general be left to the arbitrator.

Award.

Award.] No precise form of words is necessary to constitute an award: it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. A mere proposal or recommendation is, however, not sufficiently decisive (*p*). Where an enlargement has been made, the omission to recite it is no objection to the award (*q*). And the same of a view which the submission required the arbitrator to take (*r*). Where a cause was referred to three arbitrators, with a power to them, or any two of them, to make an award, an award made by two of them was holden good, it appearing that the third had notice of the meetings, &c. (*s*). When the award is made, the arbitrator gives notice to the attornies of the parties that it is ready, and that each of them may have his part on the day therein specified, on payment of the expenses. This notice is deemed the publication of the award; and it is so, according to a decision of the Queen's Bench, though the arbitrator demand unreasonable charges (*t*); but this has been doubted in the Common Pleas (*u*). When an award purports and is attested to be published on a certain day, the court will presume it to have been published on that day, without any positive affidavit to that effect (*v*). After the award is delivered (*x*), or after notice given by the arbitrator of its being ready for delivery (*y*), no mistake in a material part of it, as in the calculation of figures, or in the sum awarded, &c., can be corrected (*z*), unless with the consent of both the parties (*a*); but it seems that a mistake in an immaterial part may (*b*). An alteration of the award by the

(*k*) See *post*, 1263.(*l*) *Curtis v. Bligh*, B. C., M. 639; 3 Jurist, 1152.(*m*) *Warne v. Bryant*, 5 D. & R. 301; 3 B. & C. 590, S. C.(*n*) *Scales v. East London W. & WCo.*, 1 Hodg. 91.(*o*) *Banks v. Banks*, 1 Gale, 46(*p*) *Lock v. Vulliamy*, 5 B. & Adol. 600: see *Ferguson v. Norman*, 4 Bing. N. C. 52.(*q*) *George v. Lousley*, 8 East, 13.(*r*) *Spence v. Eastern Railway Co.*, 7 Dowl. 637.(*s*) *Dalling v. Matchett*, Willes, 215.(*t*) *M'Arthur v. Campbell*, 5 B. & Adol. 518; but see *Mussselbrook v. Dunkin*, 2 Moo. & Scott, 740; 9 Bing. 605; 1 Dowl. 722, S. C.(*u*) *Mussselbrook v. Dunkin*, *supra*.(*v*) *Doe Clarke v. Stilwell*, 3 Nev. & P. 701.(*x*) *Irvine v. Elnon*, 8 East, 54.(*y*) *Henfree v. Bromley*, 6 East, 309(*z*) See *Ward v. Dean*, 2 B. & Adol. 234:*Hall v. Alderson*, 2 Bing. 476.(*a*) *Ex p. Cuerton*, 7 D. & R. 774.(*b*) *Trew v. Burton*, 1 C. & M. 533; and see what is an immaterial part, *Id*.

arbitrator after his authority is at an end is the same as if made by a stranger, and the award, if legible, will stand as it originally was(c). As to the form and contents of the award, see *post*, 1239 to 1250. SECT. 2.

The award is engrossed on 35s. stamp paper, and signed by the arbitrator in the presence of a witness. If it contain, however, 30 common law sheets, or upwards, (of 72 words each), it requires an additional stamp of 25s. for every 15 sheets above the first fifteen(d). It is usual to make out the award on stamped paper for the party in whose favour it is made, and to give copies merely, upon unstamped paper, to the others; unless the latter require originals signed and stamped as above mentioned(e).

Sometimes, however, to save the expense of the stamp and the award, a verdict is taken, subject merely to the certificate of an arbitrator as to the amount(f). And this certificate may be given even after the assizes, and after the return of the process(g), though no order of *Nisi Prius* has been obtained(h). Certificate of Amount of Damages instead of Award.

Enlargement of Time for making it.] If it be necessary that the time limited for making the award should be enlarged, the arbitrator may enlarge it as a matter of course, if a power be given him for that purpose in the submission or order; but notice should be given to the parties of his having done so, otherwise, it seems, the court will not grant an attachment for disobedience(i). Such notice may, it seems, be given by parol at the time of serving the award on the defendant, and demanding its performance(j). The mode of enlarging the time in this case, however, depends entirely on the terms of the submission or order(k). The fact of enlargement need not be stated in the award, but it is convenient to do so to obviate the necessity of an affidavit of the fact(l). As to enlargement by an umpire, see *post*, 1235. Enlargement of Time for making it. By Arbitrator.

If no such power was given, but the parties on both sides consent to the time being enlarged, then, if the cause be referred at *Nisi Prius*, or by a judge's order, or if the submission contain a clause of assent that it be made a rule of court, the time is enlarged thus:—*More to make the order or submission a rule of court; draw up the rule with the masters, and serve a copy of it on the opposite attorney; get motion-papers (to enlarge the time for making the award) signed by the counsel of each party, and take them to the masters, who will thereupon draw up the rule(m); then get another appointment on the rule* By Consent of Parties.

(c) *Henfree v. Bromley*, 6 East, 309; see *Trew v. Burton*, 1 C. & M. 533.

(d) 55 G. 3, c. 184. See *Goodson v. Forbes*, 6 Taunt. 178; 1 Marsh. 525, S. C.; *Boyd v. Emerson*, 4 Nev. & M. 99. What is an award within the act, see *Jebb v. M'Kierman*, 1 M. & M. 240. As to the consequences of a wrong stamp, see *post*, 1247.

(e) See forms of awards, Chit. Forms, 668 to 674.

(f) *Salter v. Yeates*, 5 Dowl. 291, per Parke, B.

(g) *Salter v. Yeates*, 5 Dowl. 291.

(h) *Tomes v. Hawkes*, 2 Per. & D. 248.

(i) *Hilton v. Hopwood*, 1 Marsh. 66.

(j) *Doddington v. Bailward*, 7 Dowl. 640.

(k) See *Reid v. Fryatt*, 1 M. & Sel. 1; *Davies v. Vass*, 15 East, 97; *Payne v. Deakle*, 1 Taunt. 509; *Barrett v. Parry*, 4 Id. 658. A submission by which an award is to be made on or before the — day of —, or any other day to which the submission may be enlarged, is a general authority to be executed in a reasonable time. (*M'Doughall v. Robertson*, 2 Y. & J. 11; 1 Moo. & P. 147, S. C.)

(l) *George v. Lousley*, 8 East, 13.

(m) See form of rule, Chit. Forms, 668.

BOOK IV.
PART II.

from the arbitrator, and serve a copy of this rule and appointment on the opposite attorney. Where the cause is referred under a rule of court, and the parties thus consent to the enlargement, *get the motion-papers signed by counsel (n); draw up the rule, and serve a copy of the rule and appointment, as above directed.*

In all other cases of consent, a consent in writing by the parties will be sufficient (*o*), unless the submission was by deed, in which case the consent must be by deed, if it be intended to retain the remedy by action on the original deed (*p*). And even where the submission is by deed, an agreement to enlarge, indorsed, (and stamped with an agreement stamp), will be sufficient to make an award within the enlarged time enforceable by attachment (*q*). The time may also be enlarged by altering, re-executing, and re-stamping the arbitration bonds (*r*). An enlargement, in general terms, virtually incorporates all the terms of the original submission, and, among the rest, the agreement that the submission should be made a rule of court (*s*).

By the Court
or a Judge.

If no such power was given to the arbitrator, and one of the parties would *not consent* to the enlargement of the time, then, previously to the 3 & 4 *IV.* 4, *c.* 42, *s.* 39, there was no mode of enlarging the time; and this is still the case where the submission is not by rule of court or a judge's order, and does not contain a consent to make it a rule of court. Now, however, by that act (*t*), in case of reference by rule of court, order of *Nisi Prius*, judge's order, or submission containing an agreement that it shall be made a rule of court, a power is given to the court or a judge to enlarge the time for making the award, although one of the parties refuse his assent to such enlargement. The enactment is general, as to the power of the court or a judge to enlarge the time for making an award (*u*), and it seems that the time may be thus enlarged, whether the arbitrator's authority has been revoked or not, and although the submission contains no power to enlarge the original term (*x*). And even, it should seem, if the parties submitting stipulate expressly that no award is to be made after the period mentioned in the submission, they cannot deprive the court or a judge of the jurisdiction given by this enactment (*y*). But, where an arbitrator, with power to enlarge the time, intentionally allows it to expire, the court has no power under this statute to compel the parties to proceed (*z*). *The application for this enlargement should be made by motion to the court, (the rule in the first instance being to shew cause), or by summons before a judge. An ex parte rule or order would be bad (a).*

(n) See *Halden v. Glasscock*, 5 B. & C. 340; *Dickins v. Jarvis*, *Id.* 528.

(o) See *Evans v. Thomson*, 5 East, 189. See the form, *Chit. Forms*, 668.

(p) *Brown v. Goodman*, 3 T. R. 592, n.; *Greig v. Talbot*, 2 B. & C. 185, 188; *Rex v. Bingham*, 3 Y. & J. 101, 113; *ante*, 1225.

(q) *Evans v. Thomson*, 5 East, 189; *per Bayley, J.*, 2 B. & C. 185.

(r) *Watkins v. Philpotts*, M'Clel. & Y. 393.

(s) *Evans v. Thomson*, 5 East, 189.

(t) *Ante*, 1225, 1226.

(u) *Burley v. Stevens*, 4 Dowl. 770; 1 Gale, 374, S. C.

(x) *Potter v. Newman*, 2 C., M. & R. 742; 1 T. & G. 29; 4 Dowl. 504; 1 Gale, 373, S. C.

(y) For the summons and order, see *Chit. Forms*, 668.

(z) *Doe Jones v. Powell*, 7 Dowl. 539.

(a) *Clarke v. Stocken*, 2 Bing. N. C. 651; 3 Scott, 90; 5 Dowl. 32; 2 Hodges, 1, S. C.

A power to enlarge must be strictly pursued, therefore, if by the order of *Nisi Prius*, or the judge's order, a power is given to the arbitrator to enlarge the time for making the award, until such ulterior day as he shall appoint in writing under his hand, to be indorsed on that order, and the court, or a judge thereof, shall order it is necessary, at all events before making the award, if not before the time limited for making the enlargement, to obtain a judge's order ratifying that enlargement, otherwise the award would be bad (*b*). In a somewhat similar case, however, it was held, that the judge's order might be obtained after enlargement by the arbitrator (*c*). A general power to enlarge is sufficiently exercised by appointing a subsequent day for a meeting in the presence of the parties (*d*).

SECT. 2.

Mode of Enlargement by Arbitrator.

An objection that the time for making an award has not been duly enlarged, is waived by proceeding in the reference with a knowledge of that fact (*e*). In some cases, where a verdict has been taken, subject to an award, or to the amount of damages, and the arbitrator has accidentally let the day pass without making his award, and the defendant will not consent to the time being enlarged, the court will grant liberty to the plaintiff to enter up judgment, and issue execution forthwith for the whole amount of the verdict, unless the enlargement be consented to (*f*). In another case, where a verdict was taken for the plaintiff for damages, subject to the award of an arbitrator, and the arbitrator having omitted to make the award, without any fault on the part of the defendant, the court refused to allow judgment to be entered for the plaintiff, and held that the cause must go down to trial again (*g*). And where there is no verdict, and the time has been intentionally allowed to expire, notwithstanding the arbitrator had power to enlarge it, the court has no power to compel the parties to proceed (*h*). In some cases, where a verdict has been given, the verdict (though not entered on the record) must be got rid of before the cause can be tried again, and a second verdict obtained before the first is got rid of, is irregular (*i*). The proper and regular course is to apply to the court for leave to re-try at the next assizes, notwithstanding the former verdict (*j*).

Proceedings where Enlargement has been omitted.

It may be here observed, that where a verdict is taken, subject to the certificate of an arbitrator as to the amount, with or without an order of *Nisi Prius*, he is not confined to the time before the return of the jury process, but may certify at any time, and no enlargement is necessary (*k*).

No Enlargement necessary in Case of Certificate.

(*b*) *Wrasor v. Wallis*, 10 B. & C. 107; *vice versa*, *Leggett v. Finlay*, 6 Bing. 255; 3 M. & Sel. 629.

(*c*) *Reid v. Fryatt*, 1 M. & Sel. 1.

(*d*) *Burley v. Stevens*, 4 Dowl. 770.

(*e*) *Benwell v. Hinzman*, 3 Dowl. 500; 1 C., M. & R. 935, S. C.; *Lawrence v. Hodson*, 1 V. & J. 16; *Re Hick*, 8 Taunt. 694; *Matson v. Trower*, R. & M. 17; *Leggett v. Finlay*, 3 Moo. & P. 629; 6 Bing. 255, S. C.; *Hallett v. Hallett*, 7 Dowl. 389; *post*, 1251. It seems to be in general unnecessary to state an enlargement on the face of the award (*George v. Lousley*, 8 East, 13); it is, however, convenient to do so, in order to obviate the necessity of

verifying the fact by affidavit.

(*f*) *Taylor v. Gregory*, 2 B. & Adol. 774; *Wilkinson v. Time*, 4 Dowl. 37.

(*g*) *Hale v. Phillips*, 2 Moo. & Scott, 167; 9 Bing. 89, 158, S. C.; *Doe v. Saunders*, 3 B. & Ad. 783, where there was negligence: *Hooper v. Abrahams*, 4 Moore, 3, where the arbitrator died; and see *Evans v. Davies*, 3 Dowl. 786.

(*h*) *Doe Jones v. Powell*, 7 Dowl. 539.

(*i*) *Hall v. Rouse*, 4 M. & W. 24; 6 Dowl. 656, S. C.

(*j*) *Per Alderson*, B., Id. 28; *Baker v. Cresswell*, 1 Hodges, 189.

(*k*) *Salter v. Yeates*, 5 Dowl. 291; *Tomes v. Hawkes*, 2 Per. & D. 248.

BOOK IV.
PART II.

Umpire.
What and
when ap-
pointed, &c.

Umpire.] Where a matter is referred to two or more arbitrators, it is usual to provide in the submission, that if the arbitrators shall not agree upon their award before a time therein specified, an umpire shall be appointed, by whose award the parties shall abide. This umpire is either named in the submission, (which is much the preferable mode), or the arbitrators are therein given a power to appoint one generally. In the latter case, the arbitrators may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage (*l*); and they may do so even before they have themselves entered upon an examination of the matter referred to them, even though the submission only give power to appoint in case of disagreement (*m*). Where, by the terms of a reference, the arbitrators were to appoint an umpire previously to their entering on the consideration of the matters referred, and to make their award before a certain day, or such time as they and the umpire, or any two of them, should appoint; and the arbitrators, before appointing an umpire, enlarged the time for making their award, and afterwards held a meeting at which the parties attended; the Court of Common Pleas held, that the parties, being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time having been made before the appointment (*n*).

Must not be
appointed by
Lot.

The appointment of the umpire must not be decided by chance; and where the umpire was chosen by lot, the court set aside the award on that account (*o*). But, under particular circumstances, such an appointment has been held good, where it was employed to decide between two equally eligible persons (*p*); and it would be so if the parties assented to it, with a knowledge of all the circumstances under which the choice was made (*q*); but not otherwise (*r*). And a consent by the attorney's clerks on both sides is not sufficient (*s*).

How far Ar-
bitrators may
act after ap-
pointing an
Umpire.

Although the office of arbitrator is, in general, determined by the appointment of the umpire (*t*), yet, if the arbitrators appoint an umpire who refuses to act, they may afterwards appoint another (*u*); or, if they join with the umpire in his umpirage, it is only surplusage, and will not vitiate the instrument (*x*). It follows, however, from the fact of the arbitrator's authority being determined by the appointment of an umpire, that the award cannot properly be made in part by the arbitrators, and

(*l*) *Harding v. Watts*, 15 East, 556: 569.

Smailes v. Wright, 3 M. & Sel. 559: see *Sprigens v. Nash*, 5 M. & Sel. 193: *Re Hick*, 8 Taunt. 694.

(*m*) *Roe Wood v. Doe*, 2 T. R. 644: *Bates v. Cook*, 9 B. & C. 407: but see *Reynolds v. Gray*, 1 Ld. Raym. 222; 1 Salk. 70, S. C.

(*n*) *Re Hick*, 8 Taunt. 694: and see *Matson v. Trower*, R. & M. 17: *Lawrence v. Hodgson*, 1 Y. & J. 16: *Leggett v. Finlay*, 3 Moo. & P. 629; 6 Bing. 255, S. C.

(*o*) *Ford v. Jones*, 3 B. & Adol. 248: 10 Law Journ. 104, S. C.: *Young v. Miller*, 4 D. & R. 263; 3 B. & C. 407, S. C.: *Wells v. Cooke*, 2 B. & Ald. 218: *Re Cassell*, 9 B. & C. 624: *R. v. Hodson & Drury*, 7 Dowl.

(*p*) *Neale v. Ledger*, 16 East, 51.

(*q*) *Re Tunno*, 5 B. & Adol. 488.

(*r*) *Jamieson v. Binns*, 4 Ad. & E. 945: *In re Greenwood*, 1 Per. & D. 461.

(*s*) *Re Hodson & Drury*, 7 Dowl. 569.

(*t*) *Reynolds v. Gray*, 1 Ld. Raym. 222; 1 Salk. 70, S. C.: and see *Mitchell v. Harris*, 1 Ld. Raym. 671; 1 Salk. 71, S. C.; 2 Saund. 133 a.

(*u*) See *Oliver v. Collings*, 11 East, 367: *Trippitt v. Eyre*, 3 Lev. 263, *per* three Justices, *contra* C. J.

(*x*) *Bates v. Cook*, 9 B. & C. 407: *Beck v. Sargent*, 4 Taunt. 232: *Soulsby v. Hodgson*, 1 W. Bl. 463: and see generally, 2 Saund. 133, n. (*7*).

as to the other part by the umpire (*y*), unless, indeed, there be an express provision for the purpose (*z*).

SECT. 2.

The umpire, instead of examining the witnesses, &c., himself, may receive the evidence from the arbitrators, unless the parties, or one of them, object to such a course, and require him to examine them himself (*a*).

Examination of Witnesses, &c., by.

The umpirage, like the award, must be ready to be delivered within the time limited for it. Where, by deed of arbitration, dated the *1st of June*, the arbitrators were to make their award on or before the *1st of October*, with power, in case they should not agree in making their award within the time, to appoint an umpire, and his award to be binding, so as it were made within *six months* after the date of his appointment; and the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within *six calendar*, but not within *six lunar* months of his appointment, the court held that the umpirage was ill made (*b*).

Umpirage must be made within limited Time.

In a case where the arbitrators were to make an award by 20th August, or such other day as they should appoint, and in case they disagreed an umpire was to decide by the 20th September, or such other day as he should appoint; the arbitrators enlarged their time to the 1st November, and in October gave the umpire notice of their being unable to agree; the umpire had previously (on 17th September) enlarged his time to December, in which month he made his award; and the court held, that such award was good, inasmuch as the power of enlargement by the umpire was not suspended, until, by the final disagreement of the arbitrators, he became empowered to decide upon the case, and that the *non-agreement* of the arbitrators was sufficient to authorize his interference to enlarge his time. The court also held, that notice of the enlargement by the umpire was sufficiently given to the defendant by a verbal intimation at the time of serving the award, and demanding performance; and that the *non-agreement* of the arbitrators, so as to authorize the umpire to interfere, was sufficiently notified by its appearing on the face of the award (*c*).

Enlargement of Time by Umpire.

No stamp is requisite to the appointment of the umpire (*d*). Stamps.

Costs.] Where there is *no cause in court*, the award as to costs depends entirely upon the terms of the submission; if the submission give the arbitrator no authority as to costs, he cannot award them (*e*). But where authority is given to him upon that subject, he may order either party to pay the costs, or each to pay a moiety, unless the submission require that the costs abide the event; or if the award be silent as to costs each party must pay his own costs, and the costs of the reference, equally.

Costs.

Where there is no Cause in Court.

Where there is *a cause in court*, the award, as to the costs of the reference, depends upon the terms of the rule or order

Where there is a Cause in Court.

(*y*) *Tollit v. Saunders*, 9 Price, 612.

(*z*) *Per Wood, B., Tollit v. Saunders*, 9 Price, 619; see *Heatherington v. Robinson*, 7 Dowl. 192.

(*a*) *Hal' v. Lawrence*, 4 T. R. 589; *post*, 1248; *Re Tunno*, 2 Nev. & M. 328; *Two-good v. Twogood*, Id. 335, n.

(*b*) *Re Swinford*, 6 M. & Sel. 226.

(*c*) *Doddington v. Bailward*, 7 Dowl. 640.

(*d*) *Routledge v. Thornton*, 4 Taunt. 704. See the form, Chit. Forms, 667.

(*e*) See *Candler v. Fuller*, Willes, 64; *Bell v. Bellson*, 2 Chit. Rep. 157; *Firth v. Robinson*, 1 B. & C. 277; see *Kendrick v. Davies*, 5 Dowl. 693.

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PART II.Costs of the
Reference.

under which the cause is referred; and if the rule or order give the arbitrator no authority as to costs, he cannot award them(*f*). But if, by the rule or order of reference, the costs (*generally*) are to abide the event, this includes the costs of the reference, as well as the costs of the cause(*g*). And generally, the costs of the reference are costs in the cause, where the reference is solely of the matters in dispute in the action(*h*). But this is, it seems, otherwise where other matters not in the cause are referred(*i*). And in a case where all matters in difference were referred, except the costs of the action or suit, which were to abide the event of the arbitration, in like manner as if the cause had been tried, it was decided that the arbitrator had no power over the costs of the reference; and *Gibbs, C. J.*, observed, in giving judgment, "The substance of the cases cited is, that where parties have agreed that the arbitrator shall give costs generally, they extend to the costs of the reference, as well as to those of the suit; but there was no such agreement here." It is, however, perfectly clear, that, where a cause is referred, and the order of reference is silent as to costs, the arbitrator has power over the costs of the action, but not over the costs of the reference(*k*). Where the arbitrator awarded the costs of the reference, but did not specify the sum, the Court of Common Pleas also held, that it might be ascertained by the prothonotary(*l*); and, in other cases, where the sum was specified, that court held, that it was examinable by the officer of the court, who might reduce it if he thought it exorbitant(*m*). If each party be ordered to repay a moiety of the costs of the reference, one of them may pay the entire sum, in order to get the award from the arbitrator; and he may afterwards have the same remedy against the other, if he refuse to repay his moiety, as he would have for the non-performance of any other part of the award(*n*). In practice, however, in order to obviate all questions upon this point, it is usual, in the award, to order the party in whose favour the award is made to pay the entire costs of the award in the first instance, and then that the other party shall repay him a moiety of them(*o*).

Costs of the
Action.

But as to the costs of the *action*, the arbitrator may order either party to pay them, although no express authority had been given to him upon that subject by the rule or order of reference(*p*). But if, by such rule or order, the costs are "to abide the event," the arbitrator cannot exercise any discretion in the awarding of them, or even in fixing their

(*f*) *Firth v. Robinson*, 1 B. & C. 277; *Candler v. Fuller*, Willes, 64; *Strutt v. Rogers*, 7 Taunt. 213; 2 Marsh. 524, S. C.; see *Grove v. Cox*, 1 Taunt. 165; *Macintosh v. Blyth*, 1 Bing. 269; 8 Moore, 211, S. C.

(*g*) *Wood v. O'Kelly*, 9 East, 436; but see *Barnes*, 123; *Pract. Reg.* 103.

(*h*) *Taylor v. Gordon*, 1 Dowl. 720; see *Firth v. Robinson*, 1 B. & C. 277.

(*i*) *Tregoning v. Attenborough*, 1 Dowl. 225; 5 Moo. & P. 453; 7 Bing. 733, S. C.; see *Macintosh v. Blyth*, 8 Moore, 211; 1 Bing. 269, S. C.

(*k*) *Firth v. Robinson*, 1 B. & C. 277; *Candler v. Fuller*, Willes, 64; *Roll. Arbitr.* (K.) 13; *Whitehead v. Firth*, 12 East, 167;

Bell v. Bellson, 1 Chit. Rep. 157; 1 B. & P. 34.

(*l*) *Barrett v. Parry*, 4 Taunt. 658.

(*m*) *Fitzgerald v. Graves*, 5 Taunt. 342; *Miller v. Robe*, 3 Id. 461, *cor. Tenterden, C. J.*, at chambers, 8th March, 1832.

(*n*) *Hicks v. Richardson*, 1 B. & P. 93; *Stokes v. Lewis*, 2 Smith, 12.

(*o*) This is of use for another purpose, viz. to secure to the arbitrator his costs of the award, for which it is very doubtful whether he has any remedy. (See *Burroughs v. Clarke*, 1 Dowl. 48).

(*p*) *Roe Wood v. Doe*, 2 T. R. 644; *Firth v. Robinson*, 1 B. & C. 277; see *Lewis v. Harris*, 4 D. & R. 129; 2 B. & C. 620, S. C.; *Rigby v. O'Kell*, 7 B. & C. 57.

amount (*q*), unless such discretion be necessary for properly adjudicating upon all the matters referred (*r*); and the party who would have been entitled to ordinary (*s*) costs if the action had proceeded, shall be entitled to them under the award (*r*), and to the same amount, and under the same circumstances; and, therefore, if the defendant, from the amount of the damages awarded, would have been entitled to enter a suggestion on the roll under a court of conscience act, if a verdict for the same amount had been given, he shall be entitled to costs under the award; and the same where the plaintiff is awarded no more than what is paid into court (*u*). And where a plaintiff in trespass would be entitled only to as much costs as damages, he shall have no more under the award (*r*). And the arbitrator need not notice the costs of the cause where they are to abide the event (*w*). In such a case, if the award amount to a legal termination of the suit, each party is, in general, entitled to costs on the issues on which he succeeds (*x*). If, on the other hand, it do not amount to a legal termination of the suit, and be partly in favour of one party and partly of the other, neither is, in general, entitled to costs (*y*). In some cases, however, as where several actions are referred, the submission provides that the costs shall abide the event of each (*z*). If all in favour of one, he is, of course, in such case, entitled to costs (*a*). It should be observed, however, that the award does not of itself entitle the party in whose favour it is made to costs allowed by particular statutes, on verdict, nonsuit, or other specified mode of termination of the suit, unless the arbitrator has and exercises the power of ordering the suit to be terminated in that particular mode (*b*). Therefore a defendant in replevin is not entitled to double costs, under 11 *G.* 2, *c.* 19, on an award made in his favour in pursuance of a reference before issue joined (*c*). And the court cannot award costs to a defendant where the plaintiff, on a reference before issue joined, has been awarded an amount less than that for which he had arrested the defendant (*d*).

When the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet* (*e*). But where a cause was referred at *Nisi Prius*, and the award thereon was afterwards set aside, and the cause tried again, it was held, that the party ultimately succeeding was not entitled to the costs of the first trial (*f*). And where a cause was referred *before* trial, and the reference proving abortive, the cause was afterwards tried, it was held, that the successful

Costs in Case of abortive Reference.

(*q*) *Kendrick v. Davis*, 5 Dowl. 693.

(*r*) *Reeves v. M'Gregor*, 1 Per. & D. 372.

(*s*) See *Gurney v. Buller*, 1 B. & A. 670; *Holder v. Raith*, 4 Nev. & M. 466.

(*t*) See *Highbury Archway Company v. Nash*, 2 B. & Ald. 597; *Boodle v. Davies*, 4 Nev. & M. 788.

(*u*) *Dawson v. Garrett*, 2 Dowl. 624.

(*v*) *Swinglehurst v. Altham*, 3 T. R. 138, 139; *ante*, 1142. See upon this subject generally, *Hullock*, 417 to 432; *Watson on Awards*, 89; *Finlayson v. M'Leod*, 1 B. & Ald. 663; *Pratt v. Hillman*, 6 D. & R. 481; *Rigby v. O'Kell*, 7 B. & C. 57; *Stratton v. Green*, 1 Moo. & Scott, 668; 8 Bing. 437, S. C.; *Spiny v. Webster*, 2 Dowl. 46.

(*w*) *Jupp v. Grayson*, 1 C., M. & R. 523; *Grayson v. Jupp*, *Id.*: *Spivy v. Webster*, 2 Dowl. 46.

(*x*) *Danbury v. Rickman*, 1 Scott, 564.

(*y*) *Yates v. Knight*, 2 Bing. N. C. 277.

(*z*) *Jones v. Powell*, 6 Dowl. 483.

(*a*) See *Rennie v. Mills*, 5 Bing. N. C. 249.

(*b*) *Per Littledale, J.*, *Holder v. Raith*, 4 Nev. & M. 466.

(*c*) *Gurney v. Buller*, 1 B. & A. 670; see *Barnard v. Moss*, 1 H. Bl. 107.

(*d*) *Holder v. Raith*, 4 Nev. & M. 466.

(*e*) *Burchell v. Bellamy*, 5 Burr. 2694; *Sayer*, Costs, 179, S. C.; *Tidd*, 9th ed. 833; and see *Seely v. Powis*, 3 Dowl. 373.

(*f*) *Wood v. Duncan*, 5 M. & W. 87.

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PART II.Taxation of
the Costs
awarded.

party was not entitled to the costs of the reference as costs in the cause(g).

Lastly, as to the *taxation* of the costs awarded:—If the arbitrator have not awarded a gross sum for costs, but costs generally, with or without any express direction as to their being taxed by the master, *move to make the order or submission a rule of court; draw up the rule with one of the masters, and get an appointment from him at the foot of it; give the usual one day's notice of taxation; serve a copy of the rule and appointment on the opposite attorney; and at the time appointed attend before the master, who will tax the costs and mark them on the rule.* When the arbitrator directs that the costs of the cause should be taxed by the proper officer, they should be taxed according to the *postea* (h). Even where the cause is referred before issue actually made up, the rule of *H. T., 2 W. 4, r. 74*, as to deducting costs of issue found for the opposite party, must be observed on the taxation of costs(i). Where a cause is referred at *Nisi Prius*, and less than 20*l.* is awarded, the costs must be taxed on the lower scale, unless there be an express provision to the contrary in the submission(j). Care should therefore be taken to insert in the submission a provision that the arbitrator may certify that the cause was proper to be tried before a judge. Indeed, even in a case where such a clause was inserted, and the arbitrator certified, but the judge died before the certificate was made known to him, the Court of Queen's Bench held, that they had no power to order full costs(k). If the arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the *defendant's* business to have them taxed before that day(l); and if he do not, the plaintiff may, it seems, proceed to have them taxed *ex parte*(m).

Extent of
Arbitrator's
Power over
Costs within
the Submis-
sion.

It may be here observed, that an arbitrator cannot award costs to be taxed by any person except the proper officer of the superior court; for this would be a delegation of the authority; the taxation of costs by the master being a ministerial act, but in any other person a judicial act(n). And it would appear that the arbitrator should assess the costs of an action in an inferior court, for there may be no proper officer to tax them(o). Where the arbitrator has a discretion in awarding costs, he cannot award any other than the common costs between party and party, unless he be expressly authorized so to do(p); and of course, where the arbitrator awards costs to be taxed by the master, such costs will be taxed as between party and party, and not as between attorney and client(q); and where a cause was referred by order of *Nisi Prius*, and by the order the costs of the cause were to abide the event of the award, and the costs of the special jury, which had been obtained on the motion of the defendant, and of the reference,

(g) *Doe Davies v. Morgan*, 4 M. & W. 171.(h) *Allenby v. Proudlock*, 5 Nev. & M. 636.(i) *Daubuz v. Rickman*, 1 Scott, 564;

1 Hodges, 75, S. C.

(j) *Wallen v. Smith*, 5 M. & W. 159.(k) *Astley v. Joy*, 1 Per. & D. 460.(l) *Candler v. Fuller*, Willes, 62: *Bigland v. Kelton*, 12 East, 438.(m) *Sadler v. Robins*, 1 Camp. 253.(n) *Knott v. Long*, 2 Stra. 1025; Cas.

temp. Hardw. 181, S. C.

(o) *Winter v. Garlick*, 1 Salk. 75: see *Addison v. Gray*, 2 Wils. 293; *Fox v. Smith*, Id. 268; *Hanson v. Liversedge*, 2 Vent. 242, 243.(p) *Whitehead v. Firth*, 12 East, 167; *Barker v. Tibson*, 2 Bla. Rep. 953; *Marder v. Cox*, Cowp. 127; but see *Hartnall v. Hill*, 1 Forest's R. 73.(q) *Pratt v. Salt*, Cas. temp. Hardw. 161.

were to be in the discretion of the arbitrator; the court held, that the arbitrator had only the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed; and, therefore, that, after awarding a verdict for the plaintiff, he could not award that he should pay the costs of the special jury (*r*). Where a submission is made under an order of *Nisi Prius*, the arbitrator may award costs subsequent to the order. But where the submission is by bond, he cannot award subsequent costs (*s*). An error as to costs does not necessarily vitiate the award (*t*).

As to liability to pay costs caused by revocation, default of parties, &c., see *Morgan v. Williams*, 2 Dowl. 153, and *ante*, 1225.

Arbitrator's Authority, how determined.] The arbitrator, as soon as he has made his award, is *functus officio*, and cannot afterwards alter it in any material part (*u*). So, if he do not make his award within the time limited by the rule, order, or submission, or within the enlarged time, (if the time have been enlarged), any award made by him afterwards will be void (*x*). So, in general, but not necessarily, by the appointment of an umpire (*y*), or by an express revocation of the submission (*z*), or by an implied revocation of it (*a*), the authority of the arbitrator is determined.

Arbitrator's Authority, how determined.

SECT. 3.

Setting aside the Award.

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1. *Where the Arbitrator has not pursued the Submission, or has in any other respect exceeded his Authority*, 1240.
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6. *Where the Proceedings were irregular, or fraudulent*, 1248.
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- How and within what Time*, 1251.
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In what Cases.] It may be necessary to premise, that the court will not enter into an examination of the merits, upon

(*r*) *Finlayson v. McLeod*, 1 B. & Ald. 663.
 (*s*) *Tidd's Pract.* 888, 8th. ed.; *Pr. Reg.* 45; *Barnes*, 58.
 (*t*) *Aitcheson v. Cargey*, 9 Moore, 381.

(*u*) *Ante*, 1230.
 (*x*) *Post*, 1240.
 (*y*) *Ante*, 1234.
 (*z*) *Ante*, 1225.
 (*a*) *Ante*, 1225.

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PART II.

In general.

an application to set aside an award (*a*), unless it appear manifestly from the merits that the arbitrators have acted dishonestly or corruptly (*b*); for the parties having chosen to substitute the decision of an arbitrator for that of a judge and jury, must abide by his determination in matters of law as well as of fact (*c*). Nor will the court set aside the award on the ground of the arbitrator having decided contrary to law (*d*); and this, though the arbitrator be not a barrister (*e*), unless the mistake appear on the face of the award, or upon the face of another paper delivered with it (*f*). But every ground for relief against an award, in a court of equity, is equally available in a court of common law (*g*).

Not where
the Award is
void or
doubtful.

It should also be observed, that the court will not set aside an award absolutely void—for instance, one made after the submission has been revoked—unless it is capable of being enforced by execution without suit (*h*). Also, where there is a doubt as to the validity of an award, the court will not set it aside, nor grant an attachment, but will leave the party to his action, unless where it is capable of being enforced without suit (*i*). As to the defence to an action on an award, see *post*, 1255.

Defects for
which an
Award will be
set aside.

The following are the most usual defects for which an award may be set aside:—

1. That the
Arbitrator has
not pursued the
Submission, or has
exceeded it.

1st. That the arbitrator has not pursued the submission, or has in any other respect exceeded his authority:—

If the award do not pursue the submission in every material point, the court will set it aside (*k*). Therefore, if the submission be to perform the award of the arbitrators *and* their umpire, it would seem that an award by the arbitrators only is bad (*l*). And where an arbitrator awarded payment of a debt, which did not accrue until after the parties had entered into the submission, the court set aside the award (*m*); but the court will not presume that fact; it must be proved (*m*). If the award be not made and delivered, or be ready for delivery, by the time limited in the submission, and according to the terms of it, or within the enlarged time, (when the time has been properly enlarged), any award made afterwards, without the consent of all parties, will be bad (*n*). Also an award, whereby the arbitrator assumes to reserve a power over future differences, and which power is not given him by the award, is bad (*o*). So it is bad if the arbitrator delegates his authority, as an award that a party shall put certain pre-

(a) *Lucas v. Wilson*, 2 Burr. 701: *Anderson v. Coxeter*, 1 Str. 301.

(b) 1 Saund. 327 d.

(c) See *Sharman v. Bell*, 5 M. & Sel. 504: *Richardson v. Nourse*, 3 B. & Ald. 237: 1 Chit. Rep. 674, S. C.

(d) *Wade v. Malpas*, 2 Dowl. 638: *Campbell v. Twemlow*, 1 Price, 81: *Wilson v. King*, 2 Dowl. 638 n.: and see further, *post*, 1247: *Hardy v. Ringrose*, 1 H. & W. 185.

(e) *Ashton v. Poynter*, 3 Dowl. 201: *Jupp v. Grayson*, Id. 199; 1 C., M. & R. 523, S. C.: *Perryman v. Steggall*, 2 Id. 726; 3 Moo. & Scott, 93, S. C. overruled by *Ashton v. Poynter*, 3 Dowl. 201.

(f) *Kent v. Estob*, 3 East, 18.

(g) *Rex v. Wheeler*, 3 Burr. 1259.

(h) *Doe Turnbull v. Brown*, 5 B. & C.

384: and see *Manser v. Heaver*, 3 B. & Ad. 295.

(i) *Richardson v. Nourse*, 3 B. & A. 237: *Burley v. Stevens*, 4 Dowl. 770.

(k) *Henderson v. Williamson*, 1 Str. 116.

(l) *Heatherington v. Robinson*, 7 Dowl. 192.

(m) *Banfil v. Leigh*, 7 Dowl. 175: but see *Petch v. Fountain*, 5 Bing. N. C. 442, S. C., *nom.*: *Petch v. Conlan*, 7 Dowl. 426.

(n) See *Marks v. Marriott*, 1 Ld. Raym. 115: *Freeman v. Barnard*, Id. 247; 1 Salk. 69; 3 Id. 45, S. C.: *Brown v. Vauvser*, 4 East, 584: *Henfree v. Bromley*, 6 East, 310; *ante*, 1231.

(o) *Manser v. Heaver*, 3 B. & Adol. 295; *Com. Dig. Arbitrament* (E. 15).

mises in repair to the satisfaction of *A. B.*, or the like(*p*). And a submission to refer a cause, and the subject-matter thereof, and the issue therein, to an arbitrator, does not authorize him to order a verdict to be entered up(*q*). So, under a reference of all matters in difference, an arbitrator has no right to state facts for the opinion of the court, unless there is a special direction given to him so to do(*r*). Nor does an authority to enter a verdict authorize him to enter a *stet processus*(*s*). So, where there was an agreement for a lease of a coal-mine for sixty-three years, from the 1st May, 1801, the lessee to be allowed three years from that time for winning the colliery, without payment of rent; and an arbitrator, being authorized to give such directions for a lease, according to the terms of the agreement, as he should think fit, directed a lease for sixty-three years, from the 1st May, 1804: it was holden, that he had exceeded his authority, and that the award was consequently bad(*t*). So, where the sufficiency of a title is referred, the arbitrator exceeds his authority by awarding a conveyance with a bond of indemnity(*u*). So, on a reference as to rent, the arbitrator cannot award a power of distress unless expressly authorized(*x*). So, if there be a submission of a particular difference, and there are other things in controversy, if in such a case a general release is awarded, the award is bad, at least *pro tanto*; but it must be shewn that there were such other matters to avoid the award(*y*). So, if an award be made in favour of a person who is a stranger to the submission, it will be bad, unless it be for the advantage of one who is a party to it(*z*); and the same, of course, if made against a stranger. Also, if the arbitrator decide upon more matters than were submitted to him, the award will be bad; as, if by the terms of the submission he have to determine the boundaries of certain lands, and he enter into the question of title, and decide upon it, or the like(*a*). And the same where he decides upon matters abandoned by the parties(*b*). On the other hand, where, upon a submission of all matters in difference, by partners, the arbitrator awarded that the partnership should be dissolved, it was holden good(*c*). So, where a debtor paid his creditor a sum of money, and the creditor commenced an action against him upon a further claim, and they submitted all matters in difference to arbitration; the court held, that the arbitrator in his award might order the plaintiff to repay a part of the sum which the defendant had

(*p*) *Tomlin v. Mayor, &c., of Fordwick*, 5 Ad. & El. 147: see *Petch v. Fountain*, 7 Dowl. 426, as to an award of a set-off, not due at time of action brought.

(*q*) *Hutchinson v. Blackwell*, 1 Moo. & Scott, 513; 8 Bing. 331; 1 Dowl. 267, *S. C.*: *Jackson v. Clark*, 1 M'Clel. & Y. 200: *post*, 1250: *Cattwright v. Blackworth*, 1 Dowl. 489, which shews that the court might enforce the performance of such an award, is overruled. (*Donlan v. Brett*, 4 Nev. & M. 854: *Hayward v. Phillips*, 1 Nev. & P. 288).

(*r*) *Barret v. Wilson*, 1 C., M. & R. 586; 3 Dowl. 220, *S. C.*

(*s*) *Hunt v. Hunt*, 5 Dowl. 442.

(*t*) *Bonner v. Liddell*, 1 B. & B. 80.

(*u*) *Ross v. Boards*, 3 Nev. & P. 382.

(*x*) *Pascoe v. Pascoe*, 3 Bing. N. C. 898.

(*y*) *Hill v. Thorn*, 2 Mod. 309: see

post, 1250.

(*z*) *Bedam v. Clarkson*, 1 Ld. Raym. 123: *Ecclestaide v. Mahard*, Cro. El. 4; 5 Co. 78: *Bretton v. Prat*, Cro. El. 758: *Bird v. Bird*, 1 Salk. 74; *Fisher v. Pimbley*, 11 East, 188: *Ingram v. Milnes*, 8 East, 445; and see 1 Ro. Abr. 249, pl. 15: but in *Re Skeete*, (7 Dowl. 618), *Williams, J.*, seems to have been of opinion that an award of a sum of money to be paid to a stranger, was good under the circumstances, though his lordship held that it could not be enforced by attachment.

(*a*) See *Doe Lord Carlisle v. Bailiff of Morpeth*, 3 Taunt. 378: see *Price v. Popkin*, 2 Per. & D. 304.

(*b*) *Hooper v. Hooper*, 1 M'Clel. & Y. 509: see *Bird v. Cooper*, 4 Dowl. 148.

(*c*) *Green v. Waring*, 1 W. Bl. 475.

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paid him, it appearing to have been paid in a mistake (*d*). And where the question submitted was, whether *A. or B.* had the right to the tithes of certain lands, an award of undivided moieties to both was holden good (*e*). So, where a set-off was pleaded, and by a judge's order all matters in difference, including the claims of defendant in his set-off in the said action, were referred, it was held that the arbitrator had properly taken the set-off into consideration as a matter in difference, though not payable until after the date of the action and judge's order (*f*). And where a suit at law and in equity were referred, and the costs were "to abide the event," it was held, that the event meant the ultimate and general event, not each particular part, and that the arbitrator might exercise a power over the costs at law, which was necessary for properly adjudicating upon the suit in equity (*g*). An arbitrator who had authority to decide on what terms a partnership agreement should be cancelled, directed, amongst other things, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner: it was held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority (*h*). Where a cause is referred to an arbitrator, it is not necessary that he should find for the plaintiff or defendant in the very words of the issue; it is sufficient if he decide substantially the question in dispute (*i*). Where the part in which the arbitrator has exceeded his authority is distinct and separable, the award may stand good for the rest (*post*, 1249). It may be added, that the award need not set forth in terms the performance of all the conditions required by the submission, provided they have been actually fulfilled. Thus, where the submission required that the arbitrator should take a view of certain premises before proceeding, and he did in fact take the view, the non-recital of it was held to be no objection to his award (*j*).

2. That the Award is uncertain or ambiguous.

2nd. That the award is uncertain or ambiguous:—

If there be any uncertainty in a material part of the award, at least if it do not contain certainty to a common intent (*k*), it is bad (*l*). An award that *A. or B.* shall do an act is void for uncertainty (*m*). Upon a reference to a surveyor, of a cause and all matters in difference, an award that defendant had overpaid plaintiff 34*l.* was held insufficient to entitle the plaintiff to enforce the award by attachment (*n*). So, if the award direct an act to be done, it should point out the manner of doing it in a specific manner, so as that it may be strictly obeyed; and therefore an award, that a party should put up certain grates, without stating of what price and quality, is bad (*o*). And where on the trial of a cause a verdict was taken for

(*d*) *Malcolm v. Fullarton*, 2 T. R. 645.

(*e*) *Prosser v. Goringe*, 3 Taunt. 426.

(*f*) *Petch v. Fountain*, 5 Bing. N. C. 442; *S. C.*, *nom. Petch v. Conlan*, 7 Dowl. 426.

(*g*) *Reeves v. McGregor*, 1 Per. & D. 372.

(*h*) *Burton (or Burt) v. Wigmore*, (or *Wigley*), 1 Bing. N. C. 665; 1 Hodges, 81; 1 Scott, 610, S. C.

(*i*) *Wykes v. Shipton*, 3 Nev. & M. 240.

(*j*) *Spence v. Eastern Counties Railway*

Co., 7 Dowl. 697.

(*k*) *Hawkins v. Calclough*, 1 Burr. 274.

(*l*) See *Tipping v. Smith*, 2 Str. 1024;

Ferguson v. Norman, 4 Bing. N. C. 52.

(*m*) *Lawrence v. Hodgson*, 1 Y. & J. 16; and see *Edgell v. Dalimore*, 11 Moore, 541; 3 Bing. 634, S. C.

(*n*) *Thornton v. Hornby*, 1 Moo. & Sc. 48; 3 Bing. 13, S. C.

(*o*) *Price v. Popkin*, 2 Per. & D. 304.

3,000*l.*, subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant as he should think proper, and determine all matters in difference except as to costs, the arbitrator directed a verdict to be entered for the plaintiff, (not saying for how much), and that defendant should at a time and place named pay plaintiff or his attorney 260*l.*: the award was held bad for uncertainty(*p*). And an award that a sum of 230*l.* is due to the plaintiffs, and that out of the said sum the defendants should pay the arbitrators 93*l.* for the costs of the agreement of reference and their award, and for their charge, trouble, and attendance, and for costs in certain actions mentioned in the reference, has been held uncertain, for not specifying the sum to be appropriated to each object(*q*). And under a submission in a dispute, as to a building contract, of all claims, &c., as to alleged defects, extra work, and deductions for omissions, and to ascertain what balance might be due in respect of extras and omissions, an award of 246*l.* generally to the builder was held bad for uncertainty(*r*). So, where a cause in which there were several issues was referred at *Nisi Prius*, the costs to abide the event, and the arbitrators found for the defendant on two of the issues, neither of which covered the entire cause of action, and for the plaintiff on the others, but omitted to award damages, the award was held bad, it being impossible to ascertain from it which way the arbitrator meant to find(*s*). But a *prima facie* uncertainty or want of conclusiveness in an award does not vitiate it, if it be capable of being rendered certain or conclusive, and the award may be bad or good, according to the event(*t*). Where an award ordered that the defendant should do one or other of two things, in the alternative, it was holden that the award was good, if either of the things were capable of being performed(*u*). So, where a sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was holden to be sufficiently certain(*x*). So, where a bond was ordered to be delivered up to be cancelled within a certain time from the date of the said bond, without stating the date, it was considered sufficient(*y*). So, where an action on a money bond, and all matters in difference, were referred to an arbitrator, and he directed a verdict to be entered for the plaintiff generally, it was holden sufficient, although he did not state for what amount(*z*). And where a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 90*l.*, in respect of the causes of action, and that the defendant was entitled to set off 35*l.* in respect of his journeys, &c., mentioned in the plea of set-off, and that the defendant should deliver up certain securities to

(*p*) *Mortin v. Burge*, 4 Ad. & El. 973; 6 Nev. & M. 201, S. C.

(*q*) *Robinson v. Henderson*, 6 M. & Sel. 276.

(*r*) *In re Rider*, 3 Bing. N. C. 874.

(*s*) *Wood v. Duncan*, 7 Dowl. 92.

(*t*) *Aitcheson v. Cargey*, 13 Price, 639; 2 B. & C. 170; 2 D. & R. 222, S. C.

(*u*) *Simmonds v. Swaine*, 1 Taunt. 549.

(*x*) *Armist v. Breame*, 1 Salk. 76; 2 Ld. Raym. 1076, S. C.

(*y*) *Bell v. Gipps*, 2 Ld. Raym. 1141.

(*z*) *Cayme v. Watts*, 2 B. & R. 224; and see *Cargey v. Aitcheson*, 2 B. & C. 170; 2 D. & R. 222; 13 Price, 639, S. C.; *Dicas v. Jay*, 5 Bing. 281; 2 Moo. & P. 448, S. C.

the plaintiff: it was held, that the award sufficiently ascertained the amount for which the verdict was to be entered (*a*). Where a plaintiff makes several claims against a defendant, and the defendant makes others against the plaintiff, if an arbitrator to whom the cause is referred finds that the plaintiff had no cause of action, his award is, in that respect at least, sufficiently certain (*b*). In an action against an executor, where the arbitrator found a certain sum due to the plaintiff on the balance of accounts, and awarded that the defendant should pay it out of assets on a given day: this was holden to be sufficiently certain, without stating expressly that the defendant had assets to that amount (*c*). So, in the common cases of costs, where their amount is not ascertained by the award, still this circumstance does not render the award bad for uncertainty; the maxim in these and the like cases being, "*Id certum est quod certum reddi potest*;" and in such cases the master or other officer of the court shall tax them (*d*). But the arbitrator should assess the costs of an action in an inferior court, for there may be no proper officer in such court to tax them (*e*).

3. That it does not finally settle all the Matters referred.

3rd. That the award is not final, either by reason of not deciding all the matters referred, or otherwise, making subsequent proceedings necessary:—

The award must be a final and conclusive settlement of all the matters referred; otherwise it will be bad (*f*). Therefore an award, which is no more than a mere suggestion or undecided opinion, is bad (*g*). So, if the award be ineffective,—as, if upon a submission for a partition between tenants in common, the arbitrator award their several portions, but omit to order deeds of conveyance to be executed, so as to vest the several allotments in their respective owners,—the award is bad (*h*). So, where several matters are submitted, and the arbitrator omits to decide on one or more of them (*i*); or where all matters in difference are submitted, and the arbitrator omits to decide as to some one matter which has been pointed out to him (*j*), or makes a defective award as to it (*k*), the court will set aside the award. Where costs were to abide the event, and the arbitrator omitted to give any opinion as to some of the counts in the declaration, the award was held bad (*l*). And where the declaration contained counts on a promissory note and an account stated, and the arbitrator found that plaintiff had a good cause of

(*a*) *Platt v. Hall*, 2 M. & Wels. 391; and see *Smith v. The Festiniog Railway Company*, 6 Dowl. 190; *King v. Earl of Dundonald*, 5 Dowl. 589.

(*b*) *Hayllar v. Ellis*, 6 Bing. 225; 3 Moo. & P. 553, S. C.; *Dickins v. Jarvis*, 5 B. & C. 528.

(*c*) *Love v. Honeybourne*, 4 D. & R. 814; and see *Doe Williams v. Richardson*, 8 Taunt. 697; *ante*, 1124.

(*d*) See *Cargay v. Aitcheson*, 2 D. & R. 222; 2 B. & C. 170, S. C.; *Dudley v. Nettelfield*, 2 Stra. 737; *Fox v. Smith*, 2 Wils. 267. In *Barrett v. Parry*, (4 Taunt. 658), the point was raised, but not decided.

(*e*) *Winter v. Garlick*, 1 Salk. 75; *Adison v. Gray*, 2 Wils. 293.

(*f*) See *Tipping v. Smith*, 2 Str. 1024; *Cargay v. Aitcheson*, 2 D. & R. 222; 2 B.

& C. 170, S. C.; 2 Bing. 199, S. C., in error: *Doe Turnbull v. Brown*, 5 B. & C. 384; *Manser v. Heaver*, 2 B. & Adol. 295; *Plummer v. Lee*, 2 M. & Wels. 495; 5 Dowl. 755, S. C.

(*g*) *Lock v. Vulliamy*, 5 B. & Ad. 600; see *Ferguson v. Norman*, 4 Bing. N. C. 52.

(*h*) *Johnson v. Wilson*, Willes, 248.

(*i*) *Re Robson*, 1 B. & Adol. 723; *Randall v. Randall*, 7 East, 80; *Bradford v. Bryan*, Willes, 268; *Price v. Popkin*, 2 Per. & D. 304; but see *Simmonds v. Swaine*, 1 Taunt. 549; and see 1 B. & Ald. 106.

(*j*) *Price v. Popkin*, 2 Per. & D. 304.

(*k*) *Mitchell v. Staveley*, 16 East, 58.

(*l*) *Norris v. Daniel*, 4 Moo. & Scott, 383; 2 Dowl. 798; 10 Bing. 507, S. C.

action on the promissory note, but made no adjudication on the other issue, the award was held bad (*m*). And the same where the arbitrator adjudicated on the issues joined, but omitted to award damages on a new assignment, on which there was judgment by default (*n*). And where a cause *and all matters in difference* were referred to an arbitrator, and by his award he merely directed a verdict to be entered in favour of the plaintiff for one entire sum, the award was held not final, and therefore bad (*o*). So where, in a submission to arbitration, four actions between distinct parties, and all matters in difference, were referred to the arbitrator, and the award omitted to decide upon a fifth action pending between the parties, and of which the arbitrator had notice, it was held bad (*p*). So, where all matters in difference in a cause between parties in an action against two defendants were referred to arbitration, and the arbitrator refused to adjudicate upon the subject of four checks drawn by one of the defendants alone, on the ground that it was not a matter in difference between the parties to the reference, it was held, that the award was not final and conclusive, and that it must be set aside (*q*). So, where an action of ejectment on several demises was referred, and the arbitrator awarded that the plaintiff was entitled to a certain part of the land sought to be recovered, which he set out by metes and bounds, the award was held bad on the face of it for want of finality, because it did not appear that the remaining part of the premises had been taken into consideration, and also because it did not state on which of the demises the plaintiff had succeeded; and it was also doubted (but not decided) whether it ought not to have awarded nominal damages (*r*). Where the defendant was ordered to pay the plaintiff a sum of money, unless within twenty-one days he should exonerate himself by affidavit from certain payments, &c., in which case he was to pay a less sum; the award was holden bad (*s*). So, where the award ordered, amongst other things, that the defendant should do certain work, and that the plaintiff should be at liberty to produce evidence before the arbitrator of the insufficiency of the work at any time within two months, the court held that part of the award bad (*t*). So, where the award was, that the defendant should beg the plaintiff's pardon, in such manner and place as the plaintiff should appoint, it was holden bad; for the manner and place, which were the most material circumstances, were yet to be determined (*u*). But where the parties bound themselves to abide by the opinion of counsel on the construction of a statute, and the counsel gave his opinion in favour of one of the parties, it was holden that this opinion was final and conclusive, notwithstanding it

(*m*) *Gisburne v. Hart*, 7 Dowl. 402; 5 M. & W. 50, S. C.

(*n*) *Wykes v. Shipton*, 8 Ad. & El. 246, n.

(*o*) *Goode v. Burcher*, 5 Dowl. 127. This would be good if the cause only were referred, though there were several causes of action. (See *Bird v. Cooper*, 4 Dowl. 148). And even where a cause and all matters in difference were referred, an award, "after hearing allegations on each side," that defendant should pay plaintiff a sum of money in discharge of all demands in the cause, was held sufficiently

final, it not being shewn that anything remained unadjudicated upon. (*Day v. Bonnin*, 3 Bing. N. C. 219; see *Brown v. Croydon Canal Company*, 1 Per. & D. 391).

(*p*) *Stone v. Phillips*, 6 Dowl. 247.

(*q*) *Samuel v. Cooper*, 4 Nev. & M. 520; 1 Harr. & W. 86; and see *Phipps v. Ingram*, 3 Dowl. 669.

(*r*) *Doe Madkins v. Horner*, 3 Nev. & P. 344; 8 Ad. & El. 235, S. C.

(*s*) *Pedley v. Goddard*, 7 T. R. 73.

(*t*) *Manser v. Heaver*, 3 B. & Ad. 295.

(*u*) *Glover v. Barrie*, 1 Salk. 71.

also recommended that the printed statute should be compared with the parliament roll before the matter should be settled (*x*). So an award that one of the parties should pay a sum of money to the other, on a future day, in full of all demands, is sufficiently final (*y*); and an award that one should give the other his promissory note for a certain sum, is good, being the same as awarding payment at a future day (*z*). So, where the award was, that an action pending between the parties should be discontinued, and that each should pay his own costs, it was considered sufficiently final, being in effect an award of a *stet processus* (*a*). So, where a cause and all matters in difference were referred, the costs to abide the event, as upon a trial and final judgment, to be entered up by the successful party, the arbitrator awarded that the plaintiff had no cause of action, and that he should pay defendant a sum of money, but added that it was not intended to prevent plaintiff recovering on a certain agreement signed by the defendant, but only that *at present* he had no cause of action, the award was held sufficiently final (*b*). So, where by an order of *Nisi Prius*, an action at law and all matters in difference between the parties at law and in equity, including a Chancery suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings thereon should utterly cease and determine; the Court of Queen's Bench held, that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined; although one of the matters in dispute in the Chancery suit was brought before the arbitrator, as a matter in difference between the parties, and was not otherwise disposed of than by the ending of the Chancery suit (*c*). And where a cause and all matters in dispute between the parties being referred to arbitration, the arbitrators, "having heard the proofs and allegations of the parties touching the matters in difference between them," awarded, "concerning the same," that the defendant should pay plaintiff 11*l.* 5*s.* in full of all demands in the cause, it was held sufficiently final (*d*). And where a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, so that he made his award by a certain day, (with power of enlargement), to be delivered to the parties, or, if either of them should be dead, to their personal representatives: the arbitrator was to be at liberty to make *one or more awards at his discretion*: at the time of the submission two equity suits were pending, in which the parties to the action, and also certain infants, were concerned: before any award was made, one of the parties to the equity suits died: the arbitrator, by his award, ordered a verdict to be entered for the plaintiff, damages 500*l.*; and also that the defendant should pay to the plaintiff 350*l.* for *grievances not included* in his declaration: it

(*x*) *Price v. Hollis*, 1 M. & Sel. 105.

(*y*) *Squire v. Grevett*, 2 Ld. Raym. 961; *Robinet v. Cobb*, 3 Lev. 188.

(*z*) *Booth v. Garnett*, 2 Str. 1082.

(*a*) *Blanchard v. Lilly*, 9 East. 497; and see *Jackson v. Tabsley*, 5 B. & Ald. 848.

(*b*) *Harding v. Forshaw*, 4 Dowl. 761.

(*c*) *Pearse v. Pearse*, 9 B. & C. 484.

(*d*) *Day v. Bonnin*, 3 Bing. N. C. 220; see *Brown v. Croydon Canal Company*, 1 Per. & D. 391; but see *Goode v. Burcher*, 5 Dowl. 127; *ante*, 1245.

was held, first, that the award was sufficiently final, although it did not dispose of the equity suits; secondly, that the circumstance of infants being parties to those suits did not invalidate it; thirdly, that the arbitrator's authority was not revoked by the death of one of the parties; and, lastly, that the award of 350*l.* was sufficiently certain(*e*). And where, in an action of trespass, the defendant pleaded the general issue and sundry justifications, and the cause was referred to an arbitrator, the costs to abide the event; the arbitrator awarded for the defendant on the general issue, and disposed of the rights contested in the pleas of justification, but did not in his award decide on or notice the issues upon those justifications; the Court of Common Pleas refused to set aside the award(*f*). So, where a cause in which the general issue and a set-off were pleaded was referred, the costs of the reference and award to abide the event, an award that the plaintiff had not any cause of action against the defendant was held sufficiently final; the arbitrator having thereby determined the action, and not being bound to decide upon each issue unless requested to do so(*g*). So, where one of the parties admits the claim of the other, but seeks to reduce the balance by a set-off, it is sufficient for the award to find a sum due to one party or the other, without noticing the set-off(*h*). So, where, on a reference of a cause, the costs to abide the event, the arbitrator finds for the defendant on a plea which covers *the whole* cause of action, it is no objection to the award, that, on other issues, he finds for the plaintiffs without damages(*i*). It may be added, that no other matters in difference than those decided on will be intended by the court, unless they have been made known to the arbitrator before he made his award(*j*).

4th. That the award is inconsistent:—

If one part of an award be inconsistent with another, it will be bad: as, where the arbitrator awarded that A. should pay B. 100*l.*, and both should give general releases, and that at a subsequent time B. should pay A. 20*l.*, the award was holden bad(*k*).

4. That the Award is inconsistent.

5th. That the award is illegal:—

If the arbitrator award any of the parties to do an act which is illegal, the award is so far bad(*l*). And if a sum awarded appear on the face of it to have arisen out of an illegal transaction, the award will be bad *pro tanto*(*m*). It seems, however, that the award will not be held bad, merely because it contravenes some rule of practice(*n*). And where the award was written on a wrong stamp, the court refused to set it aside upon that account; although such a circumstance

5. That it is illegal.

(*e*) *Wrightson v. Bywater*, 6 Dowl. 359.

(*f*) *Dibden v. Marquis of Anglesey*, 10 Bing. 568: and see also *Re Leeming & Fearnley*, 5 B. & Adol. 403: *Wykes v. Shipton*, 3 Nev. & M. 240.

(*g*) *Duckworth v. Harrison*, 7 Dowl. 71.

(*h*) *Brown v. Croydon Canal Comfany*, 1 Per. & D. 391.

(*i*) *Savage v. Ashwin*, 4 M. & W. 530; *contra*, if the plea covers only part. (*Wood v. Duncan*, 7 Dowl. 91).

(*j*) *Ingram v. Milnes*, 8 Fast, 445: see *Smith v. Johnson*, 15 East, 13: *Pinkerton v. Caslon*, 2 B. & Ald. 704: see *Day v.*

Bonnin, 3 Bing. N. C. 219.

(*k*) *Storke v. De Smeth*, Willes, 66: see *Fizes v. Adams*, 4 Taunt. 632: *Ames v. Milward*, 8 Id. 367, 2 Moore, 713, S. C.

(*l*) See *Alder v. Savill*, 8 Taunt. 454. But it may be good for all but the illegal part, *semble*, see *Doddington v. Bailward*, 7 Dowl. 140.

(*m*) *Aubert v. Maize*, 2 B. & P. 371: see *Steers v. Lushley*, 6 T. R. 61.

(*n*) See *Re Badger*, 2 B. & Ald. 691: *Berlington v. Southall*, 4 Price, 232: see, however, *Broadhurst v. Darlington*, 2 Dowl. 33.

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would be a good answer to any application made to enforce it (*n*).

6. That the Proceedings were irregular or fraudulent.

6th. That the proceedings were irregular or fraudulent:—
If there have been any irregularity in the proceeding—as if no notice of the meeting (*o*), or of attendance by counsel (*p*), were given to the party against whom the award was made, or the like, the court will set aside the award (*q*). The court will not, however, set aside the award on the ground that the order of reference has been improperly obtained; the application in that case should be to set aside the order of reference itself, and should be made within a reasonable time after the order (*r*). As to irregularity in the appointment of an umpire, see *ante*, 1234.

An award will not be set aside although the affidavits in support of the application disclose strong imputations upon the testimony of a material witness, who was examined before the arbitrator (*s*).

7. That the Arbitrator has misconducted himself.

7th. That the arbitrator has misconducted himself, &c.:—
If the arbitrator have been guilty of any misconduct in the course of the proceedings, the court will set aside the award (*t*), (if the submission can be made a rule of court), or a court of equity may afford relief; but such misconduct will not, it seems, afford any defence to an action, or attachment (*u*). Where an arbitrator refuses to examine witnesses, or to receive evidence, the court will sometimes set aside the award (*v*); and this, though he thought that he had sufficient evidence, without examining the witnesses. But where he refused to examine a witness because he thought him inadmissible, the court refused to set aside an award (*x*); and they would not set aside the award in a case where the arbitrator refused to examine a party in the cause who could have contradicted a witness (*y*); nor would they set it aside where the arbitrator admitted an incompetent witness (*z*). And Mr. Watson (*a*) states it to be now settled, that the arbitrator is to judge as to the competency of the witnesses; and if he receive the evidence of an incompetent witness, or reject the evidence of a competent witness, the court will not set aside the award. Where the arbitrator, after closing the examination, refused to call another meeting, and made his award, the court refused to set aside the award, although the defendant's attorney swore that he was in possession of evidence which would have repelled that upon which the award was founded (*b*). So, where the umpire re-

(*n*) *Preston v. Eastwood*, 7 T. R. 95.

(*o*) *Anon.*, 1 Salk. 71.

(*p*) *Whatley v. Morland*, 2 Dowl. 249.

For it is not reasonable that one party should have the advantage of counsel and the other not. (*Per Bayley, B.*, *Ibid.*)

(*q*) *Anon.*, 1 Salk. 71.

(*r*) *Sackett v. Owen*, 2 Chit. R. 39.

(*s*) *Scales v. East London Water Works Company*, 1 Hodges, 91; *MS.*, E. T., 5 W. 4, S. C.: *Pilmore v. Hood*, C. P.; 3 Jurist, 1153.

(*t*) See *Lucas v. Wilson*, 2 Burr. 701; *Anon.*, 1 Salk. 71; *Braddick v. Thomson*, 8 East, 344; *Grugebrook v. Davis*, 5 B. & C. 534; *Brazier v. Bryant*, 10 Moore, 587; 3 Bing. 167, S. C.: 9 & 10 W. 3, c. 15, s. 3. The misconduct need not be such in the

bad sense of the word. (See *Phipps v. Ingram*, 3 Dowl. 670).

(*u*) See 2 Saund. 327; *Brazier v. Bryant*, 3 Bing. 167.

(*v*) See *Phipps v. Ingram*, 3 Dowl. 669; *Morris v. Reynolds*, 2 Ld. Raym. 857; 1 Salk. 73, S. C.: *Hewlett v. Laycock*, 2 C. & P. 574; *Samuel v. Cowper*, 1 H. & W. 80.

(*x*) *Campbell v. Twenlow*, 1 Price, 81.

(*y*) *Scales v. East London Water Works Co.*, 1 Hodges, 91.

(*z*) *Perriman v. Steggall*, 9 Bing. 679; 3 Moo. & Scott, 93; 2 Dowl. 726.

(*a*) "Awards," p. 100, citing *Lloyd v. Archbowl*, 2 Taunt. 324; *Perriman v. Steggall*, 9 Bing. 679; 3 Moore & Scott, 93; 2 Dowl. 726, S. C.

(*b*) *Ringer v. Joyce*, 1 Marsh, 404; but

ceived the evidence from the arbitrators without examining the witnesses, the court held, that the award was not bad on that account, if the umpire had not been requested to examine them (*c*). So, where one of the defendant's witnesses was examined by the arbitrator, after the evidence on both sides was closed, and the plaintiff's attorney gone; although upon this second examination he gave a different evidence from what he had given before, and the arbitrator's decision was influenced by it, yet the court held, that this circumstance would not affect the award, unless it were brought about by the management of the defendant's attorney (*d*). And the same where he excluded the parties and witnesses, except those under examination (*e*). Also, an award cannot be set aside on a mere suspicion of favour; for instance, it cannot be set aside merely because the arbitrator is indebted to one of the parties, though the other party be ignorant of the fact, and object as soon as he becomes aware of it (*f*). Also, any objection on these grounds will be waived, by proceeding with a knowledge of it (*g*).

8th. That it appears on the face of the award that the arbitrator has mistaken the law:—

8. Mistake of Law on the Face of the Award.

If the arbitrator make a mistake in point of law, and it do not appear upon the face of the award, the court will not, in general, set aside the award upon a mere suggestion of the mistake, or upon affidavits of the facts (*i*); but if the mistake appear upon the face of the award, or even upon the face of another paper delivered with it (*k*), or if the arbitrator, on being told that an application is about to be made to the court, himself assigns the ground for his judgment for the purpose of enabling the party to make such application, and shews that he is mistaken (*l*), the award will be set aside, provided it be clearly erroneous (*m*). And where an action was brought by an attorney on a bill not taxable, and a verdict was taken subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum, it was held, that it was competent for the court to examine whether the arbitrator had adopted the right rule (*n*).

9th. That the award is bad in a part not separable from the residue:—

9. That the Award is bad in a Part not separable from the Residue.

If an award be good in part, the performance of that part which is good may be enforced, provided it be final in itself and perfectly distinct from, and independent of, that part which is bad (*o*). Therefore, an award directing a defendant

see *Doddington v. Hudson*, 1 Bing. 384; 8 Moore, 163, S. C.

(*c*) *Hall v. Lawrence*, 4 T. R. 589; see *Re Turner*, 5 B. & Adol. 488.

(*d*) *Atkinson v. Abraham*, 1 B. & P. 175; see *Re Hick*, 8 Taunt. 694.

(*e*) *Hewlett v. Hocking*, 2 C. & P. 574.

(*f*) *Morgan v. Morgan*, 1 Dowl. 611.

(*g*) *Kingwell v. Elliott*, 7 Dowl. 423.

(*h*) *Ashton v. Poynter*, 3 Dowl. 201; *Jupp v. Grayson*, Id. 199; 1 C., M. & R. 523, S. C.; *Perryman v. Steggall*, 3 Moo. & Scott, 93; 2 Dowl. 726, S. C.; *Hardy v. Ringrose*, 1 H. & W. 185; *Chace v. Westmore*, 13 East, 357; *Boutillier v. Thick*, 1 D. & R. 366; *Crump v. Symons*, 1 Bing. 104; 7 Moore, 434, S. C.; *Craven v. Craven*, 1

Taunt. 644; 1 Moore, 403, S. C.; *Delver v. Barnes*, 1 Taunt. 48; and see *Sharman v. Bell*, 5 M. & Sel. 504; *In re Badger*, 2 B. & Ald. 691; *Richardson v. Nourse*, 3 Id. 237; 1 Chit. Rep. 674, S. C.; *Gonsham v. Germain*, 11 Moore, 7; *Symes v. Goodfellow*, 4 Dowl. 642; *Armstrong v. Marshall*, 4 Dowl. 593.

(*k*) *Kent v. Elstob*, 3 East, 18.

(*l*) *Jones v. Corry*, 5 Bing. N. C. 187; but see *Doe Oxenden v. Cropper*, 2 Per. & D. 490.

(*m*) *Richardson v. Nourse*, 3 B. & A. 237.

(*n*) *Broadhurst v. Darlington*, 2 Dowl. 38.

(*o*) *Candler v. Fuller*, Willes, 64, 253; *Addison v. Gray*, 2 Wils. 293; *Ingram v. Milnes*, 8 East, 445; *George v. Lousley*,

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to remove certain hatches, part of which belonged to him absolutely, but in other parts of which he had only a share; at the same time providing that the directions of the award should affect the latter only so far as his interest extended; was held good as to all but that part in respect of which the defendant might shew his inability to proceed (*p*). In a case where the arbitrator assumed, in one part of the award, to reserve a power over future differences, but the rest of the award was good, the court rejected the improper part, and held the award good (*q*). An award of a release to the time of the award was formerly holden to be void *in toto*, not being divisible; but now an award of a release which would extend beyond the arbitrator's power is held to be void only for the time between the submission and the award (*r*). And if the arbitrator direct mutual releases on payment of a sum over which he has jurisdiction, and also of a sum over which he has none, the award is good as to the former (*s*). And it seems that when an arbitrator has ordered a verdict to be entered without authority, if the award dispose of all the matters referred independently of the verdict, that part of the award may be rejected (*t*). Where, however, an arbitrator, to whom a cause before being at issue was referred by rule of court, awarded thus:—"I award and direct that a verdict in this cause be finally entered for the plaintiffs, with £—damages:" the court held, he had exceeded his authority in directing the entry of a verdict, and that, as the award consisted of only one sentence, that direction could not be rejected, and the residue considered as an award that so much was due and to be paid, and that therefore the award was bad (*u*). And the same, where the arbitrator found an indivisible plea (set-off) partly for the defendant (*x*); but the plaintiff was allowed to waive the objection in that case.

Who may apply to set aside the Award, and how Objections may be waived.

Party in whose Favour a Mistake is made cannot apply.

Who may apply to set aside the Award, and how Objections may be waived.] It seems that a party in whose favour a mistake has been made cannot avail himself of it to set aside the award. Therefore, where an arbitrator erroneously found a plea of set-off, in part for the plaintiff, and in part for the defendant, instead of wholly for the plaintiff, the court refused to set aside the award at the instance of the defendant; and, as they had no power to amend, they gave the plaintiff the option either of having the award set aside, or of letting it stand, if he were willing to pay the defendant's costs on the issue erroneously found in his favour (the merits not being affected, and the order of *Nisi Prius* precluding a writ of error) (*x*).

Id. 13: *Stone v. Phillips*, 6 Dowl. 249: *Kendrick v. Davies*, 5 Dowl. 693. In *Doe v. Richardson*, 3 Taunt. 697, the defect in the award was only as to the direction of mutual releases. In *Attcheson v. Cargrey*, (2 Bing. 199), the arbitrator exceeded his authority by directing the mode in which the matters ordered by the award were to be done. (See *Price v. Popkin*, 2 Per. & D. 304).

(*p*) *Doddington v. Bailward*, 7 Dowl. 640.

(*q*) *Manser v. Weaver*, 3 B. & Adol. 295: see *Tomlin v. Mayor of Fordwick*, 5 Ad. & Ell. 147.

(*r*) *Pickering v. Watson*, 2 Bla. Rep. 1117: and see *Watson on Awards*, 128, &c.

(*s*) *Kendrick v. Davies*, 5 Dowl. 693.

(*t*) See *Price v. Popkin*, 2 Per. & D. 304.

(*u*) *Jackson v. Clarke*, 1 M. & Y. 200: and see *Rez v. Washbrooke*, 7 D. & R. 221: see *Haywood v. Phillips*, 1 Nev. & P. 288: *Donlan v. Brett*, 4 Nev. & M. 854: overruling *Cartwright v. Blackworth*, 1 Dowl. 489.

(*x*) *Moore v. Butlin*, 2 Nev. & P. 436. See as to the indivisibility of that plea, *Tuck v. Tuck*, 5 M. & W. 109; 7 Dowl. 373. S. C.: *Kilner v. Bailey*, 5 M. & W. 384.

After an award has been made, it is too late for the unsuccessful party to object that certain infants have been parties to the submission, and that certain other interested persons have not been made parties to it, for the party entering into the reference "must be taken to have known who were the parties to the actions to which he himself is a party, and to the submissions which he enters into, and it would be most unjust to allow him to take the chance of an award in his favour; and, that failing, to claim to set aside the whole proceedings for a defect in the submission of which he had full cognizance when he entered into it"(z).

An objection to the award being made on account of the time for making it not having been duly enlarged, or to an umpirage on account of the umpire not having been duly appointed, or on account of improper conduct in the arbitrator or umpire, or the like, may be waived by the parties attending the arbitrator or umpire, and proceeding in the reference or umpirage with a knowledge of the fact(a).

Also, if a party accept a benefit under an award—as, for instance, if an award direct, amongst other things, that the costs of the cause, and of the reference, be paid to the plaintiff, and he accept such costs—he is thereby precluded from afterwards impeaching the award(b). Where, however, an award, published nine days before the end of Hilary term, directed the defendant to pay the plaintiff a sum of money, and the plaintiff to lay out a sum of money on premises which the defendant held of him as tenant, it was held, that the defendant had not waived any objections that might be taken to the award, by not giving notice to the plaintiff of his intention to apply to the court after he had heard that the plaintiff had commenced the repairs, nor by the defendant's attorney attending the taxation of costs, and requesting a week's time to pay the money(c).

How and within what Time.] Where no action is pending, and where the submission does not contain a clause of consent that it shall be made a rule of court, the award cannot be set aside by any application to the court; but if the party grieved cannot avail himself of the defects in it by pleading, where an action is brought against him upon the bond, &c., his only remedy is by application to a court of equity; but where an action is pending and the submission is by rule of court or judge's order, or where the submission contains the clause above mentioned, the award may be set aside upon application to the court.

Where the submission contains the clause of consent above mentioned, this application must, by the 9 & 10 W. 3, c. 15, s. 2, be made before the last day of the term next after the award is made, and published to the parties(d). Where a sum is

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Objection as to Competency or Want of Parties must be made before Award.

Waiver of Objections by proceeding with a Knowledge of it.

Waiver of Objections by accepting a Benefit under the Award.

How and within what Time.

When made, where the Submission is by Deed, &c., and contains

(z) *Jones v. Powell*, 6 Dowl. 483, *Coleridge, J.*; *Wrightson v. Bywater*, 3 M. & W. 199.

(a) See ante, 1233: and see *Hewlett v. Laycock*, 2 C. & P. 574; *Kingwell v. Elliott*, 7 Dowl. 423.

(b) *Kennard v. Harris*, 4 D. & R. 272; 2 B. & C. 801, S. C.

(c) *Hayward v. Phillips*, 1 Nev. & P. 288; 6 Ad. & Ell. 119, S. C.

(d) It is published (according to the opinion of the Court of C. P.) when it is

made, and notice of the fact given to the parties, and that they may obtain it on payment of fair and reasonable charges, (*Musellbrook v. Dunkin*, 1 Dowl. 722, per *Tindal, C. J.*) The Court of Queen's Bench, however, have held that an award is published when the arbitrator gives the parties notice that it may be had on payment of his charges, whether they be reasonable or not. (*M'Arthur v. Campbell*, 5 B. & Ad. 518; 2 Nev. & M. 444, S. C.)

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make it a
Rule of Court.

awarded, subject to be reduced by the judgment of the court on a statement of facts, an application for the exercise of that judgment is, in effect, an application to set aside the award, and must be made within the appointed time(*e*). Even an application that the award be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made within that time(*f*). If the award be made in vacation, the application to set it aside must be made in the next term; but if made in term, the parties have until the last day of the second term to make the application(*g*). The application cannot be made on the last day of term(*h*); nor will the court, after the time above mentioned, entertain a motion to set aside an award for any defect whatever(*i*), even although such defect appear upon the face of the award(*j*). In one case, where the submission, being in the hands of the successful party, could not be procured, in order to make it a rule of court, in sufficient time to move in the term next after publication, the time for making the motion was enlarged by the court until the following term(*k*). But this appears to be an evasion of the statute, and probably would not now be permitted(*l*).

Where the
Submission is
by Rule or
Order.

The statute of 9 & 10 W. 3, c. 15, however, does not extend to awards where the reference has been by order of *Nisi Prius*(*m*); nor to other cases where an action is pending, and the reference has been by rule of court or judge's order(*n*); yet the court will not, in such cases, unless under very special circumstances, entertain the motion after any considerable lapse of time(*n*). And the general rule, where the reference is made by rule or order not at *Nisi Prius*, appears to be that the application should be made before the last day of the next term after the publication of the award(*o*). And the same where the reference is made at *Nisi Prius* of the cause and other matters in difference(*p*). But where a verdict is taken at *Nisi Prius*, and the cause only is referred, and the arbitrator is put merely into the place of a jury, the motion should, in ordinary cases, be made within the time limited for a motion in arrest of judgment, or for a new trial, viz. within the first four days of term which occur next after the publication of the award(*q*).

(*e*) *Anderson v. Fuller*, 4 M. & W. 470; 7 Dowl. 51, S. C.

(*f*) *Zachary v. Shepherd*, 2 T. R. 781.

(*g*) *Re Burt*, 5 B. & C. 668; *Allenby v. Proudlock*, 4 Dowl. 45, and cases there cited.

(*h*) *Fream v. Pinneger*, Cowp. 23; ante, 1186.

(*i*) *Pedley v. Goddard*, 7 T. R. 73; *Reynolds v. Askew*, 5 Dowl. 682.

(*j*) *Lowndes v. Lowndes*, 1 East, 276; *Sell v. Carter*, 2 Dowl. 245.

(*k*) *Re Perring*, 3 Dowl. 98; *sed quare*?

(*l*) See *per Coleridge, J.*, *Reynolds v. Askew*, 5 Dowl. 682; and *per* the same learned judge, in *Re Smith*, B. C., M. 1838; 2 Jurist. 1015.

(*m*) *Synge v. Jernois*, 8 East, 466; *Lucas v. Wilson*, 2 Burr. 701; *Manser v. Heaver*, 3 B. & Adol. 295; *Rawsthorne v. Arnold*, 6 B. & C. 629.

(*n*) *Rogers v. Dallimore*, 6 Taunt. 111;

1 Marsh. 471, S. C.; *Sherry v. Oke*, 3 Dowl. 349; 1 Harr. & W. 191, S. C.; *Rushworth v. Barron*, 3 Dowl. 317; 1 Harr. & W. 122, S. C.

(*o*) *Potter v. Neuman*, 4 Dowl. 504.

(*p*) *Hayward v. Phillips*, 1 Nev. & P. 288; *Moore v. Butlin*, 2 Nev. & P. 436; *Allenby v. Proudlock*, 4 Dowl.; but see *Lyng v. Sutton*, 4 Dowl. 38, which seems to limit the time to the first four days of term.

(*q*) *Rawsthorne v. Arnold*, 6 B. & C. 629; and see *Borrowdale v. Kitchener*, 3 B. & P. 244; *Kennard v. Harris*, 2 B. & C. 801; 4 D. & R. 272, S. C.; *Sell v. Carter*, 2 Dowl. 245; *Thomson v. Jennings*, 10 Moore, 110; *Reynolds v. Askew*, 5 Dowl. 682; *Allenby v. Proudlock*, 4 Dowl. 54; *per Coleridge, J.*, in *Lyng v. Sutton*, 4 Dowl. 38; but see *per Littledale, J.*, *Martin v. Burge*, 4 Ad. & Ell. 974.

It is to be observed, however, that, in cases not within the statute, it is not imperative on the court to refuse motions made after the times above specified, provided very clear and satisfactory reasons be given for the delay (*r*). Therefore, where a rule was obtained in time, and was discharged on grounds merely technical, the court granted a new rule in the second term after the publication (*s*). It has been held by the Court of Queen's Bench not to be a sufficient excuse for lateness that the arbitrator had refused to give up his award without payment of an exorbitant sum (*t*). Nor is it a sufficient excuse that the party moving did not believe that the other party intended to proceed upon the award, as there had been a previous revocation (*u*).

It may be necessary to add, that the motion to set aside a judgment entered up on an imperfect award is not limited to the periods above specified (*x*). But it is, in general, better to apply in proper time to set aside the award itself; for on motion to set aside the judgment entered on it, only such defects as appear *on the face* of the award, and would be available in answer to a motion for an attachment for disobeying it, can be taken advantage of (*y*).

First, move to make the order or submission a rule of court (*z*); and then, within the time above mentioned, get counsel to move for a rule to shew cause why the award should not be set aside, upon an affidavit of the facts necessary to sustain the objections intended to be made; but if it be intended to object to the award, merely for defects appearing upon the face of it, an affidavit will be unnecessary. As to the title of the affidavits in this case, see *ante*, 1211. By *R. E.*, 2 *G.* 4, *Q. B.* (*a*), "where a rule to shew cause is obtained in this court to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause." This rule is also adopted in the Exchequer (*b*), and there is a similar rule of *M. T.*, 10 *G.* 4 (*c*), in the Common Pleas. It is necessary, therefore, that the counsel should indorse these objections on his brief, before he sends it in to the officer of the court (*d*). It is not sufficient to state a general head of objection, as "misapprehension of the terms of the reference," or "that the arbitrator has exceeded his authority," or "that the award is uncertain," or "not final" (*e*), or the like (*f*). The rule applies to the certificate of an arbitrator empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly (*f*). But the rule does not apply to a case where

SECT. 3.

Court will in some Cases hear the Motion later if Delay be counted for.

Motion to set aside Judgment on Award not limited, &c.

Practical Proceedings to set aside the Award.

(*r*) See per Lord Tenterden, C. J., in *Raushorthe v. Arnold*, 6 B. & C. 629: per Coleridge, J., in *Reynolds v. Askew*, 5 Dowl. 682: and per Patteson, J., in *Sherry v. Oke*, 3 Dowl. 340.

(*s*) *Sherry v. Oke*, 3 Dowl. 340: *contra* if discharged substantially at first: *Carmichael v. Hockin*, 3 Nev. & M. 203.

(*t*) *M'Arthur v. Campbell*, 5 B. & Ad. 518: but see per Tindal, C. J., in *Musselbrook v. Dunkin*, 1 Dowl. 722.

(*u*) *Worrall v. Deane*, 2 Dowl. 261.

(*x*) *Manser v. Heaver*, 3 B. & Ad. 295: *Doe Madkin v. Horner*, 3 Nev. & P. 344, per Littledale, J.

(*y*) *Doe Madkin v. Horner*, 3 Nev. & P. 344; 8 Ad. & El. 235, S. C.

(*z*) 9 & 10 W. 3, c. 15, s. 2: *Clapham v. Hyham*, 7 Moore, 403; 1 Bing. 87, S. C.: see also *Kirkuso v. Hudson*, 3 Moore, 64; 8 Taunt. 733. Where in consequence of the misconduct of the arbitrator the original rule could not be obtained, the court allowed a duplicate of it to be made a rule of court. (*Thomas v. Philby*, 2 Dowl. 145).

(*a*) 4 B. & Ald. 539; 2 Chit. Rep. 376.

(*b*) See *Smith v. Briscoe*, 11 Price, 57; *Walkins v. Phillots*, 1 McClel. & Y. 394.

(*c*) 6 Bing. 348.

(*d*) See *Whatley v. Morland*, 2 Dowl. 249; 4 Tyr. 255, S. C.

(*e*) *Boodle v. Davies*, 4 Nev. & M. 788.

(*f*) *Allenby v. Proullork*, 4 Dowl. 54.

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you move to set aside a judgment entered up on an irregular award, for a defect apparent on the face of it (*g*); and a rule to set aside an award made after action commenced, on account of objections to the declaration, need not refer to the declaration, as it is sufficiently before the court (*h*). Also, it seems to be unnecessary, in any case, to state the objections in the rule, if they be stated in the affidavit on which the rule is obtained (*i*). *It must also appear on the face of the rule that it is drawn up on reading the award itself, or a copy of it (k).* And where a rule was drawn up on reading the *affidavit* and *paper writing* annexed, which was in fact a copy of the award, but was not stated to be so, the court held that the rule was bad and could not be amended (*l*); but it would have been good if it had stated that the paper writing was a copy of the award (*m*). In the Common Pleas, on moving to set aside an award made under a rule of court, the rule *nisi* ought to be drawn up on reading also the *rule* under which the matter was referred (*n*).

Cause not
shewn on last
Day of Term.

It may be necessary to observe, that cause cannot be shewn against this rule on the last day of the term, but the rule must be made peremptory for the following term (*o*); or to shew cause before a judge at chambers, in vacation.

Second Appli-
cation.

If a rule to set aside an award has once been obtained and discharged, the court will not grant another rule on the suggestion of fresh objections (*p*), unless the ground upon which the first rule was discharged was for some slip in form (*q*).

Costs of Ap-
plication.

Costs of Application.] If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs (*r*). In a case where the defendant put a wrong construction on an award, which induced the plaintiff to move the court to set it aside; the court held, that the defendant's construction was untenable, and therefore discharged plaintiff's rule; but the court would not give him the costs of the motion (*s*).

(*g*) *Manser v. Heaver*, 3 B. & Adol. 295.

(*h*) *Sherry v. Oke*, *infra*; and see *Dicas v. Jay*, 5 Bing. 281; 2 Moo. & P. 448, S. C.

(*i*) *Rawsthorne v. Arnold*, 6 B. & C. 629; 9 D. & R. 556, S. C.

(*k*) *Sherry v. Oke*, 3 Dowl. 349; 1 Harr. & W. 119, S. C.; *Price v. James*, 3 Dowl. 73; *Barton v. Ransom*, 5 Dowl. 597; *Carmichael v. Hunter*, 1 H. & W. 120.

(*l*) *Sherry v. Oke*, *supra*.

(*m*) *Platt v. Hall*, 2 M. & Wels. 391:

Hayward v. Phillips, 1 Nev. & Per. 293; 6 Ad. & El. 119, S. C.

(*n*) *Christie v. Hamlet*, 4 Bing. 195; 2 Moo. & P. 316, S. C.

(*o*) R. M., 36 G. 3, r. 4; *ante*, 1186.

(*p*) *Carmichael v. Hockin*, 3 Nev. & M. 203.

(*q*) *Sherry v. Oke*, 3 Dowl. 361; 1 Harr. & W. 119, S. C.

(*r*) *Snook v. Hellyer*, 2 Chit. Rep. 43.

(*s*) *Hocken v. Grenfell*, 6 Dowl. 250; 4 Bing. N. C. 103, S. C.

SECT. 4.

Enforcing Performance of the Award.

Where there is no Cause in Court, 1255.	Where there is a Cause in Court, 1260.
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SECT. 4.

Where there is no Cause in Court.] WHERE there is no cause in court, we have seen that the submission to arbitration is by bond, deed, or other written instrument, containing a clause of consent that the submission should be made a rule of court; or by bond, deed, or other written instrument, not containing such clause of assent, or by parol.

Where there is no Cause in Court.

In the two latter cases, in which the submission cannot be made a rule of court, the only means of enforcing a performance of the award is by action. If the submission be by bond, the prevailing party may have an action of debt on the bond, which is in general the most preferable remedy (*t*); if by other deed, he may have covenant (*u*); if by instrument not under seal, or by parol, he may have *assumpsit* on the submission; or in any of these cases, if the award be for a sum of money merely, he may have debt on the award (*v*). Before the 3 & 4 W. 4, c. 42, debt would not in such case lie against an executor or administrator on a submission by his testator or intestate; now, however by that statute, s. 14, an action of debt is given against the executor and administrator. Debt will lie on an agreement to submit with a penalty, for revoking an arbitrator's authority (*w*). Where the parties who had submitted disputes to arbitration by mutual bonds, by indorsements under seal, on the bonds of submission made within the time limited for making the award, agreed that the time should be enlarged to a future day, it was decided that an action of debt on the bond would lie for non-performance of an award made after the original time had expired, but within such enlarged time: for such indorsement operated as a defeasance, or further defeasance to the original bond (*x*). But if the indorsement had not been under seal, no action could have been maintained on the bond for non-performance of the award (*y*). The remedy in the latter case would be in debt, or *assumpsit* on the award, or *assumpsit* on the agreement (*z*). It may be necessary to observe, that in an action on an award, if it be bad on the face of it, the defendant may set it out on *oyer* and *demur* (*a*); or if the award be defective for reasons not appearing on the face of it, such as that the arbitrator has exceeded his authority, has not awarded on all

By Action, where Submission cannot be made a Rule of Court.

Defence.

(*t*) *Ferrer v. Owen*, 7 B. & C. 427; 1 M. & R. 222, S. C.

(*u*) *Marsh v. Bulteel*, 1 D. & R. 106; 5 B. & Ald. 507, S. C.

(*v*) See 2 Saund. 62 b: 2 Cbit. Pl. 6th ed. 225, notes: 2 Ld. Raym. 1040: *Kingston v. Phelps*, Peake, 227: *Keen v. Batshore*, 1 Esp. 194: *Bailey v. Lechmere*, Id. 377: *Banfil v. Leigh*, 8 T. R. 571: *Antram v. Chace*, 15 East, 209: *Hunter v. Rice*,

Id. 100.

(*w*) *Warburton v. Storr*, 4 B. & C. 103; 6 D. & R. 113, S. C.

(*x*) *Greig v. Talbot*, 3 D. & R. 446; 2 B. & C. 179, S. C.: *Rex v. Bingham*, 3 Y. & J. 301 to 313.

(*y*) *Brown v. Goodman*, 3 T. R. 592, n.

(*z*) *Watson on Awards*, 202.

(*a*) *Fisher v. Pimbley*, 11 East, 183.

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matters submitted to him, or that it is uncertain, or not final, or the like, the defendant may take advantage of such matter by plea(y); but the corruption, or other misconduct of the arbitrator in making his award, not appearing on the face of the award, is an exception, and cannot be successfully pleaded; the party's only remedy in such a case is by bill in equity.

By Action,
Attachment,
or Execution,
where Submis-
sion made a
Rule of Court.

But where the submission contains the clause of assent above mentioned, the prevailing party has an option of enforcing a performance of the award, either by action as above directed(z), or by attachment(a); or perhaps, if the order be for payment of money, by execution under 1 & 2 V. c. 110, s. 18(b)(ante, 1196). And an attachment may be obtained as well where the non-performance consists in the non-payment of money, as in the non-performance of any collateral matter(c). But interest accruing due after the making of the award cannot be recovered by attachment, but only by action(d).

Making Sub-
mission a Rule
of Court, &c.

In order to proceed by attachment or execution, *let an affidavit be made of the due execution of the bond or other instrument of submission by the subscribing witness(e); annex the bond &c. to it, and give it to counsel, with a motion-paper, to move to make the submission a rule of court. The affidavit should, it seems, be intitled in the cause, if there be one in court(f). (If the submission be by order, this affidavit is, of course, unnecessary, and you have merely to annex the order to the motion-paper(g). This is a motion of course, and is absolute in the first instance. Or, in vacation, you may obtain a judge's fiat for a rule, upon production of the above affidavit(h), and take it, together with a motion-paper, signed by counsel, to one of the masters, who will draw up the rule. If costs be awarded, get an appointment on the rule from the master; serve a copy of the rule and appointment, if any, on the opposite attorney; and, at the time appointed, attend before the master, who will tax the costs, and mark them on the rule(i). If the award be not made a rule of court, the court has no jurisdiction, and will not act, though the opposite party be willing to waive the objection(j). The enlargements, if any, must also, it seems, be made a rule of*

(y) *Mitchell v. Staveley*, 16 East, 58; *Cargays v. Aitcheson*, 3 Dowl. & R. 433; 2 B. & C. 170, S. C.

(z) See *Stock v. De Smith*, Hardw. 106; *Badley v. Loveday*, 1 B. & P. 81.

(a) 9 & 10 W. 3, c. 15, s. 1: *Willes*, 292, n.: *Bailey v. Chesely*, 1 Salk. 72; 1 Ld. Raym. 674, S. C.: *Hopcroft v. Fermor*, 1 Bing. 379; 8 Moore, 424, S. C.

(b) It has not been decided whether the 18th section of 1 & 2 V. c. 110, applies to the case of money payable by an award, on a submission, which is, or is made, a rule of court. The words of that section seem large enough to include it, at least where the submission is originally by rule of court; and even where the submission is by mutual bond or agreement, and afterwards made a rule of court in pursuance of the usual clause of consent, it seems difficult to say that the money is payable by the rule, so as that its non-payment may be punished by attachment, and yet not payable so as to be enforced by execution under 1 & 2 V. c. 110, s. 18. The question, however, is open to much

doubt, and, until it is judicially decided, it will of course be a matter of risk to act on the 1 & 2 V. c. 110, s. 18, in such a case.

(c) *Doddington v. Hudson*, 8 Moore, 510; 1 Bing. 410, S. C., repaying moiety of costs of award. (*Hicks v. Richardson*, 1 B. & P. 93; *Stokes v. Lewis*, 2 Smith, 12). It has been doubted, however, by *Patteson, J.*, whether an attachment would now be granted in cases where there would be a remedy by execution, under 1 & 2 V. c. 10, s. 18 (ante, 1196).

(d) *Churcher v. Stringer*, 2 B. & Ad. 777.

(e) See the form, *Chit. Forms*, 675, &c.

(f) *Doe v. Stillwell*, 6 Dowl. 305.

(g) If through the misconduct of the arbitrators the order of reference cannot be obtained, the court will allow a duplicate to be made a rule of court. (*Thomas v. Philby*, 2 Dowl. 145).

(h) *Re Taylor*, 5 B. & Ald. 217.

(i) See the form of rule, *Chit. Forms*, 675.

(j) *Owen v. Hurd*, 8 T. R. 643.

court(j). It seems that the act 8 & 9 W.3, only authorizes making the submission a rule of one court, and not of more than one(k). Where there is no cause in court, the submission cannot be made a rule of court after it has been revoked(l), though a judge's order of reference may, with a view to costs(m).

When you have got the costs taxed, if the party who has to perform the award do not perform it within the time thereby limited, (if any be limited), then, if it be capable of being enforced by execution under 1 & 2 W. c. 110, s. 18, (n) you may at once proceed to issue execution without any further demand or ceremony, just as you might on a judgment for the same amount(o). But if it be not capable of being enforced under that section, or you prefer proceeding by attachment, then *make a copy of the rule and allocatur(p), and of the award, and power of attorney (if any); and, after examining the copies with the originals, serve the copies upon the party personally, shewing him at the same time the originals, in such a way that he can read their contents(q).* The court will not in general grant an attachment without *personal* service, in any case where the party applying has another remedy; and this, although the party purposely avoid the service(r). But in one case, where the party had personal knowledge of the award and rule of court, the Court of Queen's Bench granted an attachment against him for non-performance of the award, although he had not been personally served(s). *Then let the person in whose favour the award is made demand of the other party the money or other thing awarded.* This demand has been held necessary, even where the award specified the time and place of performance(t). It may be made on a day subsequent to that on which the award directs the money to be paid(u). If it be inconvenient for the party himself to make the demand personally, he may depute his attorney or any other person to do it for him, by a letter of attorney(x), a copy of which must, as already observed, be served with the copies of the rule and award, and the original shewn at the same time. Where costs are awarded, a demand by the attorney of the party is sufficient without a power of attorney, even though the costs be by the terms of the rule made payable to the party himself(y). And in a case(z) where the demand of the execution of a deed was

Demand of Performance, how, when, and by whom made.

(j) See *Jenkins v. Law*, 8 T. R. 87; *Dickens v. Jervis*, 5 B. & C. 528; and see *Barton v. Ranson*, 6 Dowl. 384; 3 M. & W. 322, S. C.

(k) *Winpenny v. Bates*, 2 C. & J. 379.

(l) *King v. Joseph*, 5 Taunt. 452.

(m) *Aston v. George*, 2 B. & A. 395.

(n) See *ante*, 1256. n. (b).

(o) *Ante*, 1196; see *ante*, 1256, n. (b).

(p) *Rex v. Smithies*, 3 T. R. 351; *Reid v. Deer*, 7 D. & R. 612; *Bellairs v. Poultney*, 6 M. & Sel. 230.

(q) See *Calvert v. Redfearn*, 2 Dowl. 505.

(r) *Richmond v. Parkinson*, 3 Dowl. 703; *Re Lowe and Another*, 4 B. & Ad. 412; and see *Stunneel v. Tower*, 1 C., M. & R. 88; *Brandon v. Brandon*, 1 B. & P. 394; *Brander v. Penteace*, 5 Taunt. 813; *Read v. Fore*, 1 Chit. Rep. 170.

(s) *Re Bower*, 1 B. & C. 264; and see *Allen v. Newton*, 2 Dowl. 582.

(t) *Brandon v. Brandon*, 1 B. & P.

393, where the court yielded to the practice.

(u) *Re Craike*, 7 Dowl. 603.

(x) *Laugher v. Laugher*, 1 Dowl. 284; 1 C. & J. 368; 1 Tyrw. 352, S. C.; *Jackson v. Clarke*, 13 Price, 208; M'Clell. 72, S. C.; *Ex p. Fortescue*, 2 Dowl. 448; *King v. Packwood*, Id. 570; but see *Bass v. Maitland*, 8 Moore, 44, which, however, seems a confused report.

(y) *Inman v. Hill*, 4 M. & W. 7. The case of *Mason v. Whitehouse*, as reported in 6 Dowl. 602, appears opposed to this position; but on reference to the report of the same case, in 4 Bing. N. C. 622, it will be seen that the court subsequently discharged the rule and allowed the attachment to stand, on the authority of *Inman v. Hill*, *ubi supra*, and another case in the Exchequer.

(z) *Kenyon v. Grayson*, 2 Smith, 61.

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PART II.

made by an agent, without a power of attorney, it was held sufficient. Care must be taken to demand the exact sum or thing awarded; if you demand more, and it be refused, you cannot have an attachment for the refusal (*a*). The party making the demand must previously have performed all conditions precedent, otherwise an attachment will not be granted (*b*).

If, upon such demand, the opposite party do not pay the money, &c., in compliance with the award, then *let an affidavit be made of the service of the award and rule, and allocatur (if any), and of shewing the originals, and that the award still remains unperformed (c), and an affidavit of the due execution of the award, and notice thereof (if necessary), and of the enlargement (d), (if any), and notice thereof (if necessary); and also of the execution of the letter of attorney (if any) by the attesting witness, and of the service of a copy thereof, and of the shewing the original. Annex the rule and allocatur (if any).* Where an arbitrator has the power to enlarge the time for making his award, and the enlargements are made part of the rule of court, an affidavit of such enlargements (·) is not necessary in order to obtain an attachment. If there be a cause in court the affidavit should be intitled in the cause (*f*). The affidavit will be sufficient if it disclose a regular service, although the surname of the arbitrator or umpire is misdescribed (*g*). When the submission is made a rule of court under the statute, there being no cause depending, *the affidavit for an attachment need not be intitled (h), or it may be intitled, "In the matter" &c. (i).* When the submission to arbitration is by rule of court or by order of *Nisi Prius*, there being a cause then depending, *the affidavit for an attachment for disobeying the award must be intitled in the cause (k).*

Upon these affidavits, let counsel move for a rule nisi for an attachment for the non-performance of the award. Draw up the rule with the masters (l), and serve a copy of it, at the same time shewing the original in such a manner that he can read its contents (m). Make an affidavit of the service, which must be intitled the same as the rule (n), and give it, with a brief, to counsel, to move to make the rule absolute. If made absolute, draw up the rule with the masters, and take it to the Crown Office, to one of the clerks in court, who will thereupon make out the attachment. Take it to the sheriff's office, and get a warrant on it; give the warrant to your officer, who will thereupon arrest the party.

In shewing cause against the rule for the attachment, the other party may impeach the award for any defect appearing upon the face of it, although the time limited for applying to

Affidavit in
Support of
Motion for
Attachment.

The Motion
and Rule for
the Attach-
ment, &c.

What Defects
may be shewn
for Cause
against the
Rule.

a *Strutt v. Rogers*, 7 Taunt. 213; 2 Marsh. 524, S. C.

(b) *Watson*, 210; *Standley v. Hennington*, 2 Marsh. 276; 6 Taunt. 56, S. C. As to what is not a condition precedent, see *Doe Clarke v. Stilwell*, 3 Nev. & P. 707.

(c) See the form, Chit. Forms, 676.

(d) See *Halden v. Glasscock*, 5 B. & C. 390; 8 D. & R. 151, S. C.: *Davies v. Vass*, 15 East, 97; *Wolensbury v. Lageman*, 6 Taunt. 254; 1 Marsh. 579, S. C.

(e) *Re Smith & Reeves*, 5 Dowl. 513.

(f) *Doe v. Stilwell*, 6 Dowl. 305.

(g) *Re Smith & Reeves*, 5 Dowl. 513; and see *Dickens v. Jarvis*, 5 B. & C. 528; 8 D. & R. 285, S. C.

(h) *Anon.*, 1 Smith, 358; *Bainbrigg v. Houlton*, 5 East, 21.

(i) *Whitehead v. Firth*, 12 East, 166 a; *In re Houghton*, 2 Moo. & P. 452.

(k) *Bainbrigg v. Houlton*, 5 East, 21 a; *Whitehead v. Firth*, 12 East, 166 a.

(l) See the form, Chit. Forms, 677.

(m) *Calvert v. Redfearn*, 2 Dowl. 505.

(n) *Re Houghton*, 2 Moo. & P. 452.

set aside the award may have elapsed (*o*); but not for matter extrinsic (*p*). A cross demand is no defence to the application (*q*). Where it was proposed to shew corruption in the arbitrator as cause against the rule for the attachment, the Court of Common Pleas held, that although that might be a good reason for setting aside the award, it was no answer to an application for an attachment (*r*): nor is a mere mis-recital in the award (*s*). Nor (where an order of reference and enlargement had been made a rule of court) can it be shewn as cause that there was no affidavit that the time was duly enlarged: but, if there be no such affidavit, the proper course is to move to set aside the rule, making the order of reference, &c., a rule of court (*t*). On shewing cause against the motion, reference cannot be made to the pleadings in the cause, unless there be an affidavit connecting them with the award (*u*).

The court will not grant an attachment against a peer (*x*), or member of the House of Commons (*y*): nor against an administrator or executor, where the submission was made by the intestate or testator (*z*). Nor on behalf of a stranger to the award (*a*). Nor even on behalf of the administrator or executor of a party who died after the award made, and to whom the money awarded was to be paid (*b*). And an attachment will not be granted, unless the award contain a distinct order to do the act, the omission of which forms the ground of the application; therefore, where an arbitrator finds by his award, that, on the balance of accounts, the defendant has overpaid the plaintiff a certain sum, but does not award that the plaintiff is to repay it to defendant, the court will not grant an attachment against the plaintiff for the non-payment of that sum (*c*). And, ordering a verdict to be entered for a certain sum, where the arbitrator has no authority to do so, cannot be treated as an order to pay that sum, so as to support an attachment (*d*). Nor will the court grant an attachment pending a rule for setting aside the award (*e*), nor pending an action on the same award; nor will they allow the plaintiff to waive the action in order to apply for the attachment (*f*), unless the defendant was in contempt before the action was brought (*g*). The rule for an attachment has, however, been made absolute, on the terms of the plaintiff's discontinuing his action and paying the costs (*h*). Where a party obtained

In what Cases, and on whose Behalf the Attachment will be granted or not.

(*o*) *Peddy v. Goddard*, 7 T. R. 73: see *Loundes v. Loundes*, 1 East, 276: *Hutchins v. Hutchins*, Andr. 297.

(*p*) *Holland v. Brooks*, 6 T. R. 161: *Paull v. Paull*, 2 Dowl. 340; 2 C. & M. 235, S. C.

(*q*) *Smith v. Johnson*, 15 East, 213.

(*r*) *Brazier v. Bryant*, 3 Bing. 167; 10 Moore, 587, S. C.

(*s*) *Paull v. Paull*, 2 C. & M. 235; 2 Dowl. 340, S. C.

(*t*) *Barton v. Ranson*, 6 Dowl. 384.

(*u*) *Rowe v. Sawyer*, 7 Dowl. 691.

(*x*) *Walker v. Earl Grosvenor*, 7 T. R. 171.

(*y*) *Catmur v. Knatchbull*, 7 T. R. 448.

(*z*) *Newton v. Walker*, Willes, 315: post, 1267. But they will when the submission was made by himself. (*Spivy v. Webster*, 2 Dowl. 46).

(*a*) *In re Skete*, 7 Dowl. 618.

(*b*) *Rex v. Massey*, 1 Dowl. 538: *Sem-*

ble, overruling *Rogers v. Stanton*, 7 Taunt. 576.

(*c*) *Re Seaward*, 7 Dowl. 318: *Thornton v. Hornby*, 1 Dowl. 237; 1 Moo. & Scott, 48; 8 Bing. 13, S. C.: and see *Scott v. Williams*, 3 Dowl. 508. The Court of Exchequer, in the latter case, considered themselves bound by the decision of the Court of Common Pleas in *Thornton v. Hornby*, notwithstanding they considered it a doubtful one. See also *Hopkins v. Davies*, 1 C., M. & R. 846: *Edgell v. Dalimore*, 3 Bing. 634; 11 Moore, 541, S. C.: *Re Lee*, 3 Nev. & M. 860.

(*d*) *Donlan v. Brett*, 4 Nev. & M. 854.

(*e*) *Dalling v. Matchett*, Willes, 215.

(*f*) *Badley v. Loveday*, 1 B. & P. 81.

(*g*) *Paull v. Paull*, 2 C. & M. 235; 2 Dowl. 340, S. C.: *Higgins v. Willes*, 3 M. & R. 382.

(*h*) *Paull v. Paull*, 2 Dowl. 340.

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an attachment to enforce an award, and afterwards proceeded by action, the court set aside the attachment, upon the terms of the defendant's giving a bond to the plaintiff, with sureties to the master's satisfaction, and conditioned to the same effect as in the case of a recognisance of bail (*i*). The court, however, have granted an attachment, pending a foreign attachment in London upon the same award (*k*); and the party's residing out of the jurisdiction of the court is no objection to the issuing of an attachment against him (*l*). An attachment may be obtained against one of several of the parties against whom the award is made (*m*). And if an award directs costs to be paid by the parties in equal shares, there must be separate attachments (*n*). It has been doubted, whether an attachment will lie for non-payment of money ordered to be paid by rule of court, since the 1 & 2 V. c. 110, s. 18, which gives a remedy by execution.

Where the
Award is lost.

Where the award itself was lost, the court, upon affidavit of that fact, granted an attachment on a copy of it (*o*).

Attachment
for filing Bill
be set aside
Award.

Where a party filed a bill in equity to set aside an award, after entering into a rule of this court to abide by it, the court held it to be a contempt, and granted an attachment against him; but they afterwards, by consent on his paying all costs, discharged him without fine, rather than set a small one for so high an offence (*p*).

Title of Affi-
davits shew-
ing Cause.

The affidavits in answer to the rule nisi should be intitled "The Queen v. ——" (q).

Where there
is a Cause in
Court.

Where there is a Cause in Court.] If no verdict have been taken, the mode of proceeding is by attachment or action, or execution on the rule in the manner above mentioned. But if a verdict were taken, the plaintiff may proceed either by attachment or action, as above directed, or he may enter up judgment upon the verdict and sue out execution: and the defendant (if the award be made in his favour) may proceed by attachment or action; or, if the order of reference direct that the party in whose favour the award is made shall be at liberty to sign judgment for the amount payable thereunder, he may sign judgment, and issue execution for his costs (*r*).

Judgment on,
how Signed,
&c.

In order to proceed to judgment on the verdict, *move to make the order of Nisi Prius a rule of court, and draw up the rule as before directed; and the master or associate will thereupon give you the Nisi Prius record. Enter the postea on it for the amount of the sum awarded (s); give the usual one day's*

(i) *Earl of Lonsdale v. Whinnay*, 3 Dowl. 268; 1 C., M. & R. 591, S. C.

(k) *Coppell v. Smith*, 4 T. R. 313 n.

(l) *Hopcraft v. Fermor*, 8 Moore, 424; 1 Bing. 260, S. C.

(m) *Richmond v. Parkinson*, 3 Dowl. 793.

(n) *Gulliver v. Summerfield*, 5 Dowl. 401.

(o) *Robinson v. Davis*, 1 Str. 526: and see *Hill v. Townsend*, 3 Taunt. 45.

(p) *Re v. Wheeler*, 3 Burr. 1256; 1 W. Bl. 311, S. C.: and see *Davila v. Almanza*, 1 Salk. 73.

(q) *Bevan v. Bevan*, 3 T. R. 601: see *Bainbrigge v. Houlton*, 5 East, 21 a.

(r) *Maggs v. Yanston*, 6 Dowl. 401.

(s) *Lee v. Lingard*, 1 East, 401: *Grimes v. Naish*, 1 B. & P. 480: *Borrowdale v. Hitchener*, 3 Id. 244: *Hayward v. Ribans*, 4 East, 310: *Bonner v. Charlton*, 5 East, 139, 143, 144: *Prentice v. Reed*, 1 Taunt. 151: and see *Grundy v. Wilson*, 7 Id. 700. We have already seen that the arbitrator cannot, as regards an action thus referred, award greater damages than are laid in the declaration, and that where a verdict has been taken, the court will not allow the sum laid as damages to be increased, though a greater sum be capable of being proved before the arbitrator. Also that the judgment may in case of a too large award be entered for the amount of the verdict, (which is in general the amount

notice of the taxation of costs (ante, 1162); then take the postea together with the rule and award, and the papers in the cause, to one of the masters, who will thereupon mark the postea, and tax the costs, and sign judgment. It is not necessary that the defendant, in this case, should be personally served with a copy of the award; nor is it necessary to obtain leave of the court to sign judgment(*t*), unless it be required to enter up the judgment as of the term next after the finding of the verdict, where the award was not made until the term after that term(*u*). Where the award was lost, the court, upon an affidavit stating that fact, and stating the substance of the award, allowed the plaintiff to sign his judgment(*v*). A rule for delivering the *postea* to the plaintiff, that he might enter the verdict pursuant to the award of an arbitrator, may be drawn up on reading the affidavit, "and the *paper writing* thereunto annexed," provided the affidavit verify the *paper writing* as being a copy of the award(*y*).

After signing judgment, you may sue out execution, as in Execution. ordinary cases. If the award state any particular time at which the money is to be paid, execution should not be sued out, nor indeed in strictness, perhaps, should judgment be signed, before that time have elapsed(*z*).

of damages laid in the declaration), and that if entered for a greater sum, it may be amended. (*Ante*, 1222).

(*t*) *Lee v. Lingard*, 1 East, 401; *Grimes v. Naish*, 1 B. & P. 480; *Borrowdale v. Hitchener*, 3 Id. 244.

(*u*) *Brook v. Fearn*, 1 Dowl. 144.

(*x*) *Hill v. Townsend*, 3 Taunt. 45.

(*y*) *Platt v. Hall*, 2 M. & W. 391: see

Hayward v. Phillips, 1 Nev. & Per. 293:

Sherry v. Oke, 1 H. & W. 119.

(*z*) *Cullard v. Paterson*, 4 Taunt. 319.

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PART III.

ATTACHMENT.

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In what Cases.
Contemptuous Expressions towards the Court or its process.

In what Cases.] IF a person, upon being served with the process of the court, use contemptuous expressions of such process or of the court itself, the court, upon affidavit of the fact, will grant an attachment against him (*a*); if of the court, the rule is granted absolute in the first instance; if of the process, it is a rule *nisi* only (*b*). Mere violent snatching an original writ of summons from the person serving a copy of it is not a contempt of the process of the court (*c*).

Rescue.

If the sheriff return a rescue, the court will grant an attachment against the rescuers, absolute in the first instance (*d*), for the sheriff's return in this case being in the nature of a conviction, and not traversable, (the only remedy for the party, if he be not guilty, being by action against the sheriff for his false return) (*e*), it would be useless to grant a rule *nisi* (*f*).

Misbehaviour of Attornies or Officers of Court, &c.

The courts at Westminster have a power of punishing attornies and other officers of the court, by attachment, for misbehaviour in the exercise of their profession. Thus, if an attorney sue or defend an action without authority, particularly if he do so from any improper motive; or if a person, who is not an attorney, sue or defend an action for another, with or without authority, the court will punish him by attachment (*g*). So, if a person put an attorney's name to process, without his authority, the court will grant an attachment against him, and will also set aside the proceedings (*h*); or if an attorney allow an unqualified person to act in his name, or shall in any manner act as agent for such person, the court, upon application and affidavit of the facts, may order the attorney to be struck off the roll, and may commit such unqualified person to the prison of the court, for any time not exceeding one year (*i*). Also, where an attorney and his arti-

(a) 2 Hawk. c. 22, s. 36.

(b) 2 Hawk. c. 22, s. 36: *Rex v. Jones*, 1 Str. 185; *R. v. Kendrick*, Say. 114: *Anon.*, 1 Salk. 84; R. T., 17 G. 3.

(c) *Weekes v. Whitely*, 3 Dowl. 536; and see *Adams v. Hughes*, 1 B. & B. 24; *Myers v. Wills*, 4 Moore, 147.

(d) *Anon.*, Say. 121; *Rex v. Elkins*, 4 Burr. 2129; *Sheather v. Holt*, 1 Str. 531.

(e) *Rex v. Pember*, Hardw. 112.

(f) See 2 Hawk. c. 22, s. 34.

(g) 2 Hawk. c. 22, ss. 6 to 9.

(h) Vol. I. 45: *Oppenheim v. Harrison*, 1 Burr. 20: see *Hoptwood v. Adams*, 5 Burr. 2660: but see *Matthews v. Royle*, 6 Moore, 70.

(i) 22 G. 2, c. 46, s. 11: Vol. I. 43, 44.

pled clerk joined in the affidavit of execution of the articles, and the clerk swore to the service under them, and was consequently admitted an attorney; but it appearing afterwards that the articles were merely collusive, the pretended clerk being in fact an apprentice to a hatter, and his affidavit of service under the articles false, the court ordered the clerk to be struck off the roll, and granted an attachment against the attorney for the collusion (*k*). If an attorney refuse to deliver up to his client writings or money received by him in the course of his professional business, the court may punish him by attachment; but they seldom grant an attachment in such a case, without first making a rule upon the attorney to deliver up the writings, &c.; and if that rule be not obeyed, the attachment then issues for the contempt (*l*). So, if an attorney be guilty of fraud or mal-practice in his profession, the court will punish him by attachment (*m*). The court will not at once strike an attorney off the roll for a contempt, and the course is to apply for an attachment against him (*n*).

If the sheriff do not obey the rule to return the writ or bring in the body, the court will grant an attachment against him, absolute in the first instance (*o*). So, in other cases, for not executing writs or for executing them in an oppressive manner, or for not executing them effectually, &c., the court will punish the sheriff or his officers by attachment (*p*). So, where an attachment against the sheriff was directed to the coroner, and the latter was ruled to bring in the body, the court granted an attachment against him, absolute in the first instance, for not obeying the rule (*q*). The sheriff, however, is not liable to an attachment for not taking a bond in replevin; but the defendant, if damnified, may have his remedy against him by action (*r*). It may here be added, that an attachment cannot be obtained against the late sheriff for disobedience of an order directed to "the sheriff" generally (*s*).

As to the cases in which the court will punish the judges of inferior courts, justices of peace, gaolers, &c., by attachment, see 2 *Hawk. c. 22, ss. 25 to 32*; and *Rex v. Justices of Seaford*, 1 W. Bl. 432.

If any person wilfully disobey the process of the court, he is punishable by attachment (*t*). Thus, if a witness regularly served with a subpoena do not attend at the trial, and is called on the subpoena (*u*), the court, upon an affidavit, stating a personal service of the subpoena ticket a reasonable time before the trial, and payment or tender of his reasonable expenses to the witness, will grant an attachment against him (*v*). The court will not grant an attachment for disobedience of a *subpoena duces tecum*, unless it appears clearly that the party absented himself or withheld the documents in defiance and

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Sheriff or Coroner not executing Writ, or executing it oppressively, &c.

Against Judges of Inferior Courts, J. P.'s, Gaolers, &c.

Disobedience of Process.

(*k*) *Ex p. Hill*, 2 W. Bl. 991.

(*l*) 2 *Hawk. c. 22, s. 14*.

(*m*) See Vol. I. 60; 2 *Hawk. c. 22, ss.*

10, 11. (*n*) *Ex p. Townley*, 3 Dowl. 30; *Ex p. Grant*, *Id.* 320.

(*o*) Vol. I. 550, 551, 552.

(*p*) 2 *Hawk. c. 22, ss. 2 to 5*. See *Chasman v. Maddison*, 2 Str. 1089.

(*q*) *Andrews v. Sharp*, 2 W. Bl. 911;

Rex v. Peckham, *Id.* 1218.

(*r*) *Ante*, 813; *Ex v. Lewis*, 2 T. R.

617.

(*s*) *R. v. Sheriff of Cornwall*, in *Hemming v. Tremera*, 7 Dowl. 600.

(*t*) See the subject of attachment for disobedience of process discussed in the learned judgments delivered by the judges in *Dom. Proc.*, *Miller v. Knox*, 4 Bing. N. C. 574.

(*u*) *Rex v. Stretch*, 3 Dowl. 368.

(*v*) Vol. I. 236; *Thorpe v. Graham*, 11 Moore, 55; 3 Bing. 223, S. C. 2 *Hawk. c. 22, s. 34*.

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PART III.Disobedience
of Rule or
Order.

contempt of the court (*u*). The motion in such a case must be made as soon as possible, and at all events in the term succeeding the trial (*v*).

For disobedience of any rule of court, or of any judge's order or order of *Nisi Prius* made a rule of court (*w*), the party guilty of it is punishable by attachment, if the rule or a copy of it have been personally served upon him, the rule itself at the same time shewn to him (*x*), a demand personally made upon him to comply with the rule (*y*), and a neglect or refusal to do so (*z*). Thus, the non-performance of an award, if made under a rule of court, or if the submission, order of *Nisi Prius*, or judge's order, be made a rule of court, is punishable by attachment (*a*). And if the rule require the party to do a thing forthwith,—as, for instance, to reinstate certain premises,—the court, upon application, will grant an attachment, if the party do not presently begin the work, although the work be of such a nature that it may take some time to complete it (*b*). Where, however, attornies, in pursuance of an order, had delivered an account of sums received for their client, the court refused to grant an attachment on affidavits impeaching the accuracy of the account, observing, that “an attachment can only be on the ground of wilful contempt” (*c*).

Where a person is ordered by a rule of court *absolutely* to pay money or costs (*d*), and a copy of the rule (*e*), with the master's *allocatur* thereon (if any) (*f*), is *personally* (*g*) served on him, and the rule itself at the same time (*h*) shewn to him (*i*), and a demand made of the money or costs by the

(*u*) *R. v. Lord John Russell*, 7 Dowl. 693.

(*v*) *Thorpe v. Graham*, 3 Bing. 223; 11 Moore, 55, S. C.

(*w*) As to the necessity of making the order a rule of court before applying for an attachment, see *Baker v. Rye*, 1 Dowl. 689.

(*x*) *Ret v. Smithies*, 3 T. R. 351; *Bar-nard v. Berger*, 1 New. Rep. 121; *Baker v. Rue*, 1 Dowl. 689; *Re Lowe*, 4 B. & Adol. 412; *ante*, 1257. The judge's order need not be served. (*Greenwood v. Dyer*, 5 Dowl. 255).

(*y*) *Doddington v. Hudson*, 8 Moore, 510; 1 Bing. 410, S. C.: *infra*.

(*z*) 2 Hawk. c. 22, s. 37: see *Davies d. Povey v. Roe*, 2 W. Bl. 892; *Camden v. Edie*, 1 H. Bl. 21, 49; *Cooke v. Tanswell*, 8 Taunt. 131; 2 Moore, 513, S. C.: *Doddington v. Harris*, 1 Bing. 187; *North v. Evans*, 2 H. Bl. 35.

(*a*) *Ante*, 1257, 1258.

(*b*) *Doddington v. Hudson*, 1 Bing. 464; 8 Moore, 510, S. C.: see *Doddington v. Bailward*, 7 Dowl. 640.

(*c*) *Ex p. Lawrence*, 2 Dowl. 231.

(*d*) It should be here observed that the 18th section of 1 & 2 V. c. 110, has provided a much more convenient and efficacious remedy for costs and other monies ordered to be paid by rule of court, than that by attachment. Under the provisions of that section, as we have already seen, (*ante*, 1196), all rules of court by which any sum of money, or any costs, charges, or expenses, are made payable to any person, have the effect of judgments, and may be enforced in the same way, viz. by execution. Indeed, it has been doubted, but not decided, whether that section

has not virtually done away with attachments for non-payment of money by rendering them unnecessary. The question, however, is not of much practical importance, for few will prefer the proceeding by attachment to that by execution, which is at once easier, cheaper, more speedy, and more effectual.

(*e*) *Dalton v. Tucker*, 5 Dowl. 550. It must in every respect be a correct copy. (*Ret v. Calvert*, 2 C. & M. 189; 2 Dowl. 276, S. C.)

(*f*) *Dalton v. Tucker*, 5 Dowl. 550. An *allocatur* is the property of the person in whose favour it is made. (*Doe v. Robinson*, 2 Dowl. 503).

(*g*) *Birkett v. Holme*, 4 Dowl. 556; the dictum of Pateson, J., in that case throws great doubt upon *Stannall v. Towers*, 1 C., M. & R. 88; 2 Dowl. 673, S. C.: *Woollen v. Hodgson*, 3 Dowl. 178; *Allier v. Newton*, 2 Dowl. 582; where a personal service was, under circumstances, dispensed with. If the defendant admits that he has received, (*Phillips v. Hutchinson*, 3 Dowl. 583), or refuses to receive, (*R. v. Koops*, 3 Dowl. 566), or by knocking down or other violence prevents the serving of the rule and *allocatur*, this is equivalent to personal service. (*Wenham v. Downes*, 3 Dowl. 573).

(*h*) To obtain an attachment, all the necessary steps must be taken at the same time. (*Rogers v. Twissel*, 3 Dowl. 572).

(*i*) It need not be placed in his hands: if it be shewn, so that he can read its contents, that is sufficient. (*Calvert v. Redfearn*, 2 Dowl. 505). A service of the original rule would be sufficient. (*Leaf v. Jones*, 3 Dowl. 315).

person to whom they are payable, according to the terms of the rule, or by some person deputed by him by letter of attorney, such letter being shewn to the party, and a copy of it served on him (*k*), and left with him (*l*); if he do not pay the money or costs when thus demanded, the court will grant an attachment against him, absolute in the first instance (*m*): unless they be costs taxed between attorney and client, pursuant to the master's *allocatur*, in which case, the rule for the attachment will be a rule *nisi* only in the first instance (*n*). The demand, in case of a judge's order, should be made *after* the judge's order has been made a rule of court (*o*). The demand should, in general, be made by the person pointed out as the recipient by the rule; therefore, where money &c. is payable to several, the demand must be made by all, or by their deputy appointed by joint power of attorney (*p*). In the case of costs, however, there is a distinction, and where the plaintiff's attorney demanded the costs, without a letter of attorney authorizing him to do so, it was deemed sufficient; for the attorney was, in fact, entitled to the costs when received (*q*). Where a rule directs costs to be paid to the party or his attorney, a demand not made by the attorney who had conducted the cause in London, but by the attorney in the country who employed him, is sufficient (*r*). And a demand of costs payable to the high sheriff, may be made under the authority of a power of attorney, executed by the under-sheriff, after the high sheriff has gone out of office (*s*). But a demand by the attorney's clerk, or any other party not named as the party to whom the costs are to be paid, unless acting under a power of attorney, as above mentioned, is not sufficient (*t*), even where the money is made payable to the party (not an attorney) "or his agent" (*u*). Although a party is at one time in contempt for not paying costs which have been duly demanded, yet, if before an attachment is moved for, the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment (*x*). A demand may be dispensed with if the party by violence prevent it (*y*). Also, if the rule be that the party should do the act within a specified time, "*or that, in default thereof, an attachment should issue against him,*" no demand is necessary (*z*). Where a party is ordered *conditionally* only to pay

(*k*) See *ante*, 1257.

(*l*) *Doe Cope v. Johnson*, 7 Dowl. 550.

(*m*) R. T., 17 G. 3: see *Rex v. Stokes*, Comp. 136: *Rex v. Ireland*, 3 T. R. 512. In the Exchequer it is now grantable without first issuing a subpoena, as was formerly requisite. (*Doe v. Fry & Barker*, 2 Dowl. 217; 2 C. & M. 234. S. C.)

(*n*) *Bray v. Yates*, 1 Dowl. 459.

(*o*) *Chilton v. Ellis*, 2 Dowl. 338.

(*p*) *Sykes v. Hayn*, 4 Dowl. 114, case of a bond.

(*q*) *Per Holroyd, J., MS.*, T. 1820, acc., though the costs were by the terms of the rule made payable "to the plaintiff." (*Inman v. Hill*, 4 M. & W. 7: but see *Mason v. Whitehouse*, 6 Dowl. 602, C. P. *contra*). It appears however from the report of *Mason v. Whitehouse*, in 4 Bing.

N. C. 692, that the court subsequently discharged the rule and allowed the attachment to stand, on the authority of *Inman v. Hill*, (*ubi supra*), and another case in the Exchequer.

(*r*) *Dennett v. Pass*, 1 Scott, 586; 3 Dowl. 632; 1 Bing. N. C. 638, S. C.

(*s*) *R. v. Matty*, 6 Dowl. 515.

(*t*) *Ex v. Fortescue*, 2 Dowl. 448: *Clark v. Dignum*, 3 M. & W. 319.

(*u*) *Brown v. Jenks*, 4 Dowl. 581; but *Patteson, J.*, said, that if the party were an attorney, and the demand made by his London agent, it might have been different. (*Id.*)

(*x*) *Spivy v. Webster*, 1 Dowl. 696.

(*y*) *Wenham v. Downes*, 3 Dowl. 573: see *R. v. Koops*, 3 Dowl. 566.

(*z*) *Woollison v. Hodgson*, 3 Dowl. 178.

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costs, then an attachment will not be granted against him for the non-payment of them (*a*). Therefore, where a plaintiff obtains a rule to discontinue, upon payment of costs, he is not punishable by attachment if he do not pay them (*b*). So, if the defendant obtain a rule or order to stay proceedings upon payment of debt and costs, he cannot, in general, be punished by attachment, if he do not afterwards pay the debt and costs; but the plaintiff should proceed in his action (*c*). So, where the defendant obtained a rule for changing the venue from Middlesex on payment of costs of the motion, and all other costs *bonâ fide* incurred, and rendered useless by the rule, and, after taxation, the defendant gave notice that he abandoned the rule, it was held by the Court of Exchequer, (*Maule, B., dissentiente*), that the rule was conditional only, and that the defendant was not bound to abide by it, though the plaintiff had, in the meantime, incurred the costs of his witnesses, who were on their way to town when the rule was made absolute (*d*). An attachment cannot be obtained for non-payment of costs pursuant to the master's *allocatur*, if there was no undertaking or order to pay them (*e*). And where a client obtains the usual order to tax an attorney's bill, and for the delivery of deeds, &c., "upon payment" &c., the client cannot be attached for non-payment pursuant to the *allocatur*, unless the usual undertaking to pay, what shall appear to be due on taxation, be filed at the judges' chambers, and made a rule of court (*f*).

Breach of
Undertaking

Upon obtaining leave to compound a penal action, the rule must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound the action (*g*); and if he do not afterwards pay it, the court, upon application, will award an attachment against him (*h*). Before the recent rule of *H. T.* 4 *W.* 4 (*i*), if a defendant paid money into court, and did not afterwards pay the costs, an attachment might be granted against him for the non-payment of them; but now, perhaps, the course is to sign judgment for them (*k*).

Abuse of the
Process of the
Court.

If any person abuse the process of the court, he is punishable for it by attachment: as, where execution was sued out without a judgment to warrant it (*l*); where a woman brought an appeal of the death of her husband, knowing at the same time that her husband was alive (*m*); where a *latitat* was sued out merely for the purpose of bringing a defendant within the jurisdiction of an inferior court, in order to sue him there (*n*); where the plaintiff, after bringing an action in one court, commenced an action in another for the same debt, and against the same defendant (*o*); or, where a person sued out bailable process, and thereupon arrested a witness, for the purpose of preventing him from giving evidence before an arbitrator (*p*),

(*a*) *Turner v. Gill*, 3 Dowl. 31: *Rex v. Fenn*, 2 Dowl. 182.

(*b*) *Ante*, 1059: *Stokes v. Woodeson*, 7 T. R. 6.

(*c*) *Ante*, 986, 987.

(*d*) *Pugh v. Kerr*, 5 M. & W. 164.

(*e*) *Harrison v. Ward*, 3 Dowl. 541: *Ryalls v. Emerson*, 2 Dowl. 357.

(*f*) *Price v. Philcox*, 7 Dowl. 559.

(*g*) *R. E.*, 33 G. 2, r. 2.

(*h*) *Rex v. Clifton*, 5 T. R. 257.

(*i*) *Ante*, 973, 974.

(*k*) See *ante*, 974, 975.

(*l*) *Waterhouse v. Saltmarsh*, Hobart, 264; Fortesc. 267.

(*m*) 8 H. 4, 7: 2 Hawk. c. 22, s. 39.

(*n*) 2 Hawk. c. 22, s. 40.

(*o*) 14 H. 7, s. 6: 6 Co. 60: 2 Hawk. c. 22, s. 41: and see *Id.* s. 42.

(*p*) *Rex v. Hall*, 2 W. Bl. 1110.

or the like. So, if a person forge the process of the court, or alter or fill it up after it has been sealed; or, if he obtain judgment in ejectment, by an affidavit of service of the declaration on one who was procured to personate the tenant; in these and the like cases, the court will punish the person so offending by attachment (*q*). But merely altering a sheriff's warrant is not a contempt of court, unless an improper use be made of it (*r*). And it is, as we have seen, a common practice to alter and re-seal writs of mesne process (*s*). The court have also granted an attachment against a person for sending inflammatory papers to the jurors summoned upon a certain trial, and for preventing some of them from attending by sending them notice that the trial was put off (*t*). And, in another case, they granted an attachment against a man for threatening a prosecutor with danger of his life because he had prosecuted another for some offence (*u*).

As to contempts committed in the face of the court, there is of course no necessity for an attachment, that being merely a process to bring the defendant before the court; but he may be instantly apprehended and imprisoned at the discretion of the judge, without any other proof or examination. See as to the punishment of jurors for misconduct, 2 *Hawk. c. 22, ss. 14 to 24*.

Contempts committed in the Face of the Court.

If a client, when his business in court is despatched, refuse to pay the officer the fees that are due to him for doing business, the court on motion will grant an attachment against him to have him committed until he pay the fees; for not paying the fees is a contempt of court, and the court is bound to protect its officers in their rights (*x*).

For not paying Officer's Fees.

It may be necessary to add, that, although the courts will not grant an attachment against peers or members of parliament for the non-performance of an award, non-payment of costs, or the like (*y*); yet for very gross contempts, such as rescous, disobedience of the queen's writs, or the like, they will (*z*).

Against Peers or Members of Parliament.

The court will not grant an attachment against an executor of the lessor in ejectment for costs (*a*); such lessor having died after entering into the consent rule. But it may be doubted whether a *scire facias* would not now lie, in such a case, to have execution on the rule in the same way as on a judgment against the testator (*b*).

Against Executor.

The Motion and Rule for the Attachment.] The application for an attachment *must be founded on an affidavit of the facts necessary to constitute the contempt* (*c*), *to which should be an-* The Motion and Rule for the Attachment.

(*q*) 2 *Hawk. c. 22, s. 43*; see *Finnerty v. Smyth*, 1 *Scott*, 743; 1 *Bing. N. C.* 649, *S. C.*

(*r*) *Hale v. Castleman*, 1 *Bl.* 2.

(*s*) *Ante*, 1119.

(*t*) *Rex v. Lucas*, 3 *Burr.* 1564.

(*u*) *Rex v. Carroll*, 1 *Wils.* 75.

(*x*) 1 *Lil. Prac. Reg.* 598: *Tidd's Suppl.* 51.

(*y*) *Walker v. Earl Grosvenor*, 7 *T. R.* 171; *Catmur v. Knatchbull*, *Id.* 448: *ante*, 1259.

(*z*) 2 *Hawk. c. 22, s. 33*: *Rex v. Earl Ferrers*, 1 *Burr.* 634; *Foley v. Langhorne*,

Say. 50; see *R. v. Bishop of St. Asaph*, 1 *Wils.* 332; *Lechmere Charlton's case*, 2 *Myl. & Cr.* 316.

(*a*) *Doe Payne v. Grundy*, 1 *B. & C.* 284: *ante*, 1259.

(*b*) See 1 & 2 *V. c.* 110, s. 18.

(*c*) What these facts are, has been fully stated in the preceding pages, from 1262 to 1267 inclusive. The contempt must be clearly made out. (*Gardner v. Crosswell*, 2 *M. & W.* 319). If the affidavit describe a rule of court as "an order," an attachment will not be granted. (*Re Turner*, 6 *Dowl.* 6).

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nexed the rule (if any) disobeyed, and referred to in the affidavit; (see as to the title of affidavits, in cases of attachment generally, *ante*, 1213); excepting in the case of a rescue, where the sheriff's return of the rescue is deemed sufficient, although he returns that the rescue was from his bailiff(c). The application should be made promptly(d). It has, however, been granted on an affidavit three months old when it could not have been made sooner(e). The application must, in general, be made by a barrister(f). *The court will thereupon grant either a rule for the attachment absolute in the first instance, or a rule to shew cause why the attachment should not issue.*

Rule when
Absolute in
the first in-
stance, or
only Nisi.

For non-payment of costs on the master's *allocatur*, or against the sheriff for not obeying the rule to return the writ, or bring in the body, or for a contempt of the court in the execution of process of the court, or where the rule or order disobeyed orders in the alternative(g), the rule is absolute in the first instance(h); in all other cases it is a rule *nisi* only. And it is a rule *nisi* only if for an attachment for non-payment of costs pursuant to the master's *allocatur* between attorney and client, the *allocatur* in that case being in the nature of an award(i). So it is a rule *nisi* only, if the attachment be for not paying costs pursuant to a rule of court, where these costs form part of a rule, for disobedience to which a rule *nisi* only for an attachment can be granted(k). So it is, it seems, a rule *nisi* only for non-payment of costs under an award(l). So it is a rule *nisi* only for disobedience to a side-bar rule by a clerk of assize(m). If a rule *nisi* merely, it cannot be moved for on the last day of term(n); but if absolute in the first instance, it may(o).

Rule and Ser-
vice of.

If the rule be granted, *draw it up with the masters; and (if a rule nisi) serve a copy of it personally on the opposite party, at the same time shewing him the original rule.* Where it appeared from circumstances that the defendant kept out of the way, for the purpose of avoiding a personal service of the rule, the court, in two instances, upon an affidavit of these circumstances, ordered that leaving it for him at his last and most usual place of abode should be deemed good service(p); but, in other and later cases, the court have ruled otherwise(q); and the rule, as now understood, and more especially since the late rule of all the courts of *H. T.*, 2 *W.* 4, is, that a service will not be dispensed with(r), even where the party is an attorney(s); unless indeed it appears that the rule

(c) *Gobbey v. Dewes*, 3 Moo. & Scott, 556; 10 Bing. 112, S. C.

(d) *R. v. Stretch*, 4 Dowl. 30, and per Lord Denman, C. J.

(e) *R. v. Rogers*, 3 Dowl. 605: see *R. v. C. D.*, 1 Chit. 723.

(f) *Ex p. Fenn*, 2 Dowl. 527: *Ex p. Pitt*, Id. 439: but see *R. v. Lord John Russell*, 7 Dowl. 693.

(g) *Ex p. Grant*, 3 Dowl. 320: see *Garnier v. Brown*, 2 Jurist, 82.

(h) *R. T.*, 17 G. 3.

(i) *Spragg v. Willis*, 2 Dowl. 531: *Boomer v. Mellor*, Id. 533: *Green v. Light*, 2 Dowl. 578.

(k) *Ex p. Townley*, 3 Dowl. 39.

(l) *Thomson v. Billingsby*, 2 Chit. 57.

(m) *Anon.*, B. C., E. 1839, 3 Jurist, 364.

(n) *Anon.*, 3 Smith, 118.

(o) See *ante*, Vol. I. 97.

(p) MS., M. 1814: and *Green v. Prosser*, 2 Dowl. 99.

(q) *Stunnell v. Tower*, 1 C., M. & R. 88: *Rex v. Carpenter*, MS., H. 1825: *Anon.*, 1 Chit. Rep. 99: and see *M'Ilham v. Smith*, 8 T. R. 86: *Re Barwick*, 3 Dowl. 703.

(r) *Birkett v. Holmes*, 4 Dowl. 556: see *R. H.*, 2 *W.* 4, r. 51: *Anon.*, 1 D. & R. 520: *Stunnell v. Tower*, 1 C., M. & R. 88.

(s) *Wilkinson v. Pennington*, 6 Dowl. 183; 5 Scott, 401, S. C.

has been seen in the actual personal possession of the party who should have been served with it (*t*), or under some very strong facts (*u*). The party to be served being an attorney of the court will make no difference (*x*). *Make an affidavit of service, and give it with brief to counsel, to move to make the rule absolute.* The court will not in general allow cause to be shewn at chambers (*y*).

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It will be no answer to this rule for the party to say that he was not personally served with the rule *nisi* or the original rule; if the affidavit of the party applying for the attachment state a personal service, that will be deemed conclusive of the fact (*z*). And when a party against whom a rule *nisi* for an attachment had been obtained, appeared, and objected that the rule *nisi* had not been personally served, the court notwithstanding made the rule absolute (*a*). Although the party, in shewing cause, deny by his affidavit what is imputed to him, yet, if what he states be incredible, the court will make the rule absolute (*b*). It is, however, good cause against an attachment for disobeying a rule of court, that every possible exertion has been made to comply with the rule, but without effect (*c*), or that the disobedience arose from a wrong construction of the rule, which the party was advised and believed to be correct (*d*), or it would seem that the rule, though purporting to be made with his consent, was, in reality, entered into without his knowledge (*e*). And in general it would seem that an attachment will not be granted unless the contempt be intentional. And an attachment has been set aside on the ground that, in the copy of the original rule and *allocatur*, the defendant's name was written "Calver," instead of "Calvert," and the master's name "Day," instead of "Dod;" the *allocatur*, therefore, not appearing to be the master's (*f*).

Shewing Cause, what sufficient.

If the rule be made absolute, draw it up with the clerk of the rules; take the rule to one of the clerks in court, at the Crown Office, who will thereupon make out the attachment. Or in the Common Pleas or Exchequer make out the attachment yourself on parchment, and get it signed at the master's office, and sealed.

Rule Absolute.

Form of the Attachment, and how Sued out and Executed.] The attachment, although a judicial writ, must be returnable on a general return day; and not on a day certain (*g*). It must bear *teste* in term time. *Indorse on it the name and address of the attorney, and also, in the Queen's Bench, (by the R. H., 2 & 3 G. 4), the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney may be able to give (h).* Take the attachment to the sheriff's office, if it be directed to him, and obtain a warrant

Form of the Attachment, and how sued out and executed.

(*t*) In the matter of Bower, 1 B. & C. 64: and see *Allier v. Newton*, 2 Dowl. 582: *Rex v. Koops*, 3 Id. 566: *Phillips v. Hutchinson*, Id. 583.

(*u*) *Re Barwick*, 3 Dowl. 703: *Re Fenell*, Id.: *Dicas v. Warne*, 1 Scott, 537: *Wenham v. Doune*, 3 Dowl. 573.

(*x*) *Albin v. Toomer*, 3 Dowl. 563.

(*y*) *Fall v. Fall*, 2 Dowl. 88.

(*z*) *Hopley v. Granger*, 1 N. R. 256.

(*a*) *Lery v. Duncombe*, 3 Dowl. 447:

see *ante*, 1189.

(*b*) In the matter of Crossley, 6 T. R. 701.

(*c*) *Cooke v. Tunswell*, 8 Taunt. 131:

see *Doddington v. Bailward*, 7 Dowl. 640.

(*d*) *Fuller v. Prentice*, 1 H. Bl. 49: *Camden v. Edir*, 1 H. Bl. 21.

(*e*) See *Bodington v. Harris*, 1 Bing. 187.

(*f*) *Smith v. Calvert*, 2 Dowl. 276.

(*g*) *Rex v. Wilkin*, 1 Str. 624.

(*h*) See *ante*, Vol. I. 450, 451.

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on it; give the warrant to your officer, who will thereupon arrest the defendant. The sheriff is not entitled to poundage; and it seems he is not the proper person to receive, and cannot be called upon to pay into court, money paid him under an attachment(h).

Where Prisoner in Custody of Marshal.

The proper mode of charging a defendant, who is a prisoner in custody of the marshal, with an attachment, is by lodging the attachment with the sheriff, who will take the defendant thereon, as soon as he is out of the custody of the marshal(i).

Not executed on Sunday.

It may be necessary to mention that the defendant cannot be arrested on a Sunday(j); nor can even the rule nisi be served on that day(k).

Rule to Return.

If the sheriff, or other officer, to whom this writ is directed, do not return it when necessary, you may rule him to do so.

Alias, &c.

If he return *non est inventus*, you may sue out an *alias* in the manner above directed; and if he return *non est inventus* to the *alias*, then get a certificate to that effect from your clerk in court, and take it to a judge's chambers, and obtain a warrant thereon, upon which the party may be arrested in any county. An *alias* attachment lies against a defendant, who, being in custody on attachment for non-payment of money, has been allowed by the plaintiff to go at large, upon terms which he has failed to comply with(l).

Commitment, and Bail on.

[*Commitment, and Bail on.*] When the defendant is arrested upon this writ or warrant, he is (except where the attachment is for non-payment of money, or non-performance of an award, or the like, in which case he is detained until he pays or performs, *post*, 1281) brought into court or before a judge at chambers, and sworn to answer interrogatories; he is then committed, unless, with the leave of the court or a judge, he enter into a recognisance, with sureties, for his appearance in court from day to day, to answer interrogatories concerning such matters as may be objected against him. Or the defendant may appear voluntarily, and be sworn, and enter into the recognisance, as above mentioned. Serve a notice on the opposite attorney that the defendant will appear in court, or before a judge at chambers, on a certain day, in order to enter into a recognisance, and be sworn to answer all such interrogatories as shall be exhibited against him, stating the names and additions of the bail, as in ordinary cases(m). This notice should be given twenty-four hours, at least, previously to the defendant's being brought up, if the bail reside in town; or two days, or more, if they reside elsewhere, according to the distance(n). Then get a rule from the clerk of the rules on the crown side, to bring up the defendant, if he be in the custody of the marshal; but if in the custody of the sheriff, it seems a writ of *habeas corpus* will be necessary(o). When brought up, the recognisance is taken as in ordinary cases. It has been said that no justification of such bail is necessary(p). But it would seem, that in

(h) *Rex v. Palmer*, 2 East, 441: *Rex v. Sheriff of Devon*, 3 Dowl. 10.

(i) *Boucher v. Sims*, 4 Dowl. 173; 2 C., M. & R., 392, S. C.

(j) *Rex v. Myers*, 1 T. R. 265, 266: but see *Anon.*, Willes, 459: *Ex p. Whitchurch*, 1 Atk. 55.

(k) *M'Illeham v. Smith*, 8 T. R. 86.

(l) *Good v. Wilks*, 6 M. & Sel. 413.

(m) See *Anon.*, 4 D. & R. 393.

(n) See *R. v. Hall*, 2 W. Bl. 1110.

(o) *Imp. C. P.* 570.

(p) *R. v. Hall*, 2 W. Bl. 1110.

this, as in other criminal cases, "the sureties may be examined on oath concerning their sufficiency by him that takes the bail; and if a person be bailed by insufficient sureties, he may be required, either by him who took the bail, or by any other who hath power to bail him, to find better sureties; and, on his refusal, may be committed; for insufficient sureties are as none"(q). It is entirely discretionary with the court, or a judge, whether they will allow the defendant to be bailed or not; and in very gross cases, or where the defendant appears evidently guilty, they usually refuse it(r).

Interrogatories, &c.] Upon the defendant's being bailed or committed, the court, upon application, will grant a rule, that, unless the prosecutor exhibit interrogatories against him in the Crown Office within four days, the defendant shall be discharged. *Draw up the rule with the clerk of the rules on the crown side, and serve a copy of it on the prosecutor or his attorney;* and if the interrogatories be not exhibited within the time limited by the rule, the defendant may move to be discharged out of custody, or (if he be out on bail) that his recognisance be discharged. The prosecutor, however, may exhibit his interrogatories at any time before the motion is actually made(r).

Interrogato-
ries, &c.

These interrogatories must be exhibited in all cases, excepting the case of an attachment for non-payment of money, or non-performance of an award, or the like, which is in the nature of a civil execution(s); but in all other cases the interrogatories alone contain the charge against the defendant, the attachment being but process to bring him in to answer to the charge when exhibited. Therefore, the defendant cannot come in and confess the contempt before the interrogatories are filed; for until they are filed there is no charge in court against him to which he can plead(t). The case of an attachment for a rescue, indeed, depends upon different grounds; for there the sheriff's return of the rescue is in itself a conviction, and not traversable(u). Yet, even in that case, it is the invariable practice of the court to put the defendant to answer interrogatories, unless the prosecutor consent to his confessing the contempt without them(x).

Engross these interrogatories on parchment, and get them signed by counsel(y). *File them with the examiner, who will make out a copy on paper for the defendant.* *If the defendant be in custody of the marshal, get a rule from the clerk of the rules on the crown side to have him brought up before the examiner to be examined; get an appointment on it from the examiner; and serve copies of the rule and appointment on the marshal and on the defendant.* *If in custody of the sheriff, the defendant must, perhaps, be brought up by habeas corpus.* *If out on bail, however, it is merely necessary to get an appointment from the examiner, and serve a notice of it upon the defendant or his attorney; or if the defendant desire the examin-*

Proceedings
before and at
Examination
on the Inter-
rogatories.

(q) Bac. Abr., Bail in Criminal Cases, F.

(r) 2 Hawk. c. 22, s. 1.

(s) See *Bonafous v. Schoole*, 4 T. R.

316.

(t) *Rex v. Edwards*, 4 Burr. 2105; 1 W.

Bl. 637, S. C.

(u) *Rex v. Elkins*, 4 Burr. 2129; 1 W.

Bl. 640, S. C.

(x) *Rex v. Horsley*, 5 T. R. 362.

(y) R. M., 34 G. 3. See the form, 10

Went. 404; Chit. Forms, 678.

BOOK IV.
PART III.Refusal to
Answer.The Refer-
ence to Mas-
ter, Report
and Judgment
thereon.

ation, he may get the appointment, and attend to be examined at the time so appointed. The examiner thereupon examines the defendant upon the interrogatories, and will afterwards make out copies of the examination for the parties upon paper.

If the defendant, upon being brought up, refuse to answer to the interrogatories, he shall be recommitted; or if out on bail, and he do not attend to be examined, his recognisance may be estreated, or the court may again attach him for this second contempt, and punish him at their discretion. It should be observed, however, that the defendant is not obliged to answer any interrogatories tending to convict him of any other offence (*z*), or which may subject him to a penalty (*a*).

When he has been examined, the prosecutor then moves that the examination, &c., be referred to the master, which is a motion of course. Draw up the rule with the clerk of the rules on the crown side; get an appointment upon it from the master, and serve a copy of the rule and appointment on the opposite attorney. Let each attorney then attend before the master, together with their clerks in court, and counsel, if thought necessary, and the master will hear the statements and arguments on both sides. After which, when you learn that the master is ready, move the court for his report; a notice of which motion should be given to the defendant, as he must attend personally in court at the time the master makes his report. It may be necessary to observe, that this motion cannot be made on the last day of term, without the permission of the court, or under very special circumstances (*b*). The report is binding and conclusive, unless an objection be pointed out to some specific portion of it (*c*). If the defendant have cleared himself of his contempt in his answer, the master will report accordingly (*d*), and the court will thereupon order him to be discharged out of custody, or, if he be out on bail, will order his recognisance to be discharged; but he is still liable to an indictment for perjury, if his answer be false (*e*). But if sufficient be confessed by the answer to prove him guilty of the contempt, the master accordingly reports him in contempt, and the court gives judgment of fine or imprisonment, or both, and sometimes of corporal punishment (*f*), at their discretion, in the same manner as upon a conviction for a misdemeanour at common law. The court, however, if they think fit, may waive the giving of judgment, and order the recognisance to be discharged (*g*); or the attorney-general may consent that the defendant continue at large, upon his recognisance to appear, under a rule of court, at some future time (*h*). If judgment be not given during the same term, the cause will be set down in the peremptory paper with those motions appointed to come on peremptorily in the ensuing term (*i*).

Costs.

(z) *R. v. Barber*, Str. 444.(a) *B. C.*, II. 239; 2 Hawkins by Curwood, 207, 1.(b) *Rex v. Wheeler*, 1 W. Bl. 311; 3 Burr. 1256, S. C.(c) *Re Isaacson*, 8 Moore, 217, per cur.: *Coulson v. Graham*, 2 Chit. 57.(d) See *In the matter of Isaacson*, 8 Moore, 214; 1 Bing. 272, S. C.(e) *Saunders v. Melhuish*, 6 Mod. 71; see 2 Hawk. c. 22, s. 1: *Rex v. Wheeler*, 3 Burr. 1257.(f) *Rayson's case*, Cro. Car. 146: *Rex v. Vaughan*, 1 Wils. 22.(g) *Rex v. Wheeler*, 3 Burr. 1256; 1 W. Bl. 311, S. C.(h) *Rex v. Beardmore*, 2 Burr. 797.(i) *R. H.*, 34 G. 3.

charged, he is not in strictness entitled to costs; yet, if it clearly appear to the court that the prosecutor must have known his complaint to be ill-founded and vexatious, they will order him to pay costs to the defendant (*k*).

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PART III.

As the business on the crown side of the Court of Queen's Bench is conducted by the clerks in court, the attorneys on either side have little to do in the proceedings upon an attachment in that court; but each employs a clerk in court, who conducts the proceedings for him.

Proceedings
conducted by
Clerks in
Court.

In the case of an attachment for the non-payment of money or non-performance of an award, or the like, the attachment being in the nature of a civil execution (*l*), interrogatories are never filed, but the party is detained in custody until he pay the money or perform the award. Yet in cases where the rule for the attachment is absolute in the first instance, if the defendant wish to dispute the fact of the contempt, he may rule his adversary to exhibit interrogatories as above mentioned. The sheriff cannot, it seems, be required to pay into court money levied by him under an attachment (*m*). Indeed, in strictness, the money should not be paid to the sheriff, but to the opposite party or his attorney.

Proceedings
on Attach-
ment for Non-
payment of
Money, &c.

As to the proceedings upon an attachment against the sheriff, see *Vol. I.* 552, 555.

Discharge for Irregularity.] If there be a misnomer of the Christian name of the defendant, or other irregularity in the attachment, the prisoner may obtain his discharge by application to the court. Even where the mistake in his name was amended by judge's order, the defendant was discharged (*n*). But he might be retaken, though not detained on such amended writ (*n*). The application must be made in reasonable time,—from the 3rd of February to the 10th day of Easter term is unreasonable (*o*).

Discharge for
Irregularity.

(*k*) *Rez v. Plunket*, 3 Burr. 1329.

(*l*) See *Bonafous v. Schoole*, 4 T. R. 316.

(*m*) *Rez v. Sheriff of Devon*, 3 Dowl. 10.

(*n*) *Reg. v. Burgess*, Bail Court, H.

1838, *Coleridge and Patteson, JJ.*, 2 Jurist, 856.

(*o*) *Reg. v. Burgess*, 3 Nev. & P. 366.

APPENDIX (a).

TABLES OF FEES.

1. *A Table of Fees to be taken by the Sheriffs, Under-Sheriffs, Deputy-Sheriffs, Sheriffs' Agents, Bailiffs, and others the Officers or Ministers of Sheriffs in England and Wales, pursuant to the Statute of 1 Vict. c. 55 (b), 1275.*

2. *A Table of Fees prepared pursuant to the Statute 1 Vict. c. 30, s. 6, by Commissioners appointed under Statute 11 Geo. 4 & 1 Will. 4, c. 58, and allowed and sanctioned by the Judges, 1279.*

3. *Directions to Taxing Officers as to all writs issued on or after the 15th March, 1834, 1287.*

For every Warrant which shall be granted by the Sheriff to his Officers, upon any Writ or Process:—[See post, 1279, as to the charge where there are several defendants.]

	£	s.	d.
In London and Middlesex	0	2	6
And on Crown and Outlawry process, an additional	0	2	6
In all other counties, where the most distant part of the county shall not exceed 100 miles from London	0	5	0
Not exceeding 200 miles	0	6	0
Exceeding 200 miles	0	7	0
For an arrest in London	0	10	6
In Middlesex, not exceeding a mile from the General Post Office	0	10	6
Not exceeding seven miles from same place	1	1	0
In other counties, not exceeding a mile from officer's residence	0	10	6
Not exceeding seven miles	1	1	0

(a) It is thought more advisable to collect the following Tables of Fees in one view than to encumber the body of the Work with them. (b) This statute does not deprive the sheriff of poundage or of fees on statutes not mentioned in it. (See Vol. I. 17).

	£	s.	d.
Exceeding seven miles	1	11	6
For conveying the defendant to gaol from the place of arrest, <i>per mile</i>	0	1	0
For an undertaking to give a bail bond	0	10	6

For a Bail Bond.

If the debt shall not exceed £50	0	10	6
Ditto £100	1	1	0
Ditto £150	1	11	6
Ditto £300	2	2	0
Ditto £400	3	3	0
Ditto £500	4	4	0
If it shall exceed £500	5	5	0
For receiving money under the statute upon deposit for arrest, and paying the same into court, if in London or Middlesex	0	6	8
If in any other county	0	10	0

For Filing the Bail Bond.

If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0

Assignment of Bail or other Bond.

If in London or Middlesex	0	5	0
If in any other county, including postage	0	7	6
For the return to any writ of Habeas Corpus, if one action	0	12	0
And for each action after the first	0	2	6
For the bailiff to conduct prisoner to gaol <i>per diem</i>	0	10	0
And travelling expenses <i>per mile</i>	0	1	0
For searching offices for detainers	0	1	0
Bailiff's messenger for that purpose	0	2	6
To the bailiffs, for executing warrants on extent, capias utlagatum, levare facias, fieri facias, ca. sa., ne exeat, attachment, elegit, writ of pos- session, forfeited recognisance, process from pipe office, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles	1	1	0
If beyond that distance <i>per mile</i>	0	0	6
On Distringas in London	0	5	0
In Middlesex, not exceeding five miles from General Post Office	0	5	0
Exceeding five miles	0	10	0
In other counties, not exceeding five miles from officer's residence	0	5	0
Exceeding five miles	0	10	0
For each man left in possession, when absolutely necessary—			
If boarded <i>per diem</i>	0	3	6
If not boarded <i>per diem</i>	0	5	0

£ s. d.

For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300*l.*, 5 per cent.—480*l.*, 4 per cent.—500*l.*, 3 per cent.—and where it exceeds 500*l.*, 2½ per cent.

For the certificate of sale to save auction duty	0	2	6
Bond of indemnity, besides stamps	1	10	0
Certificate of execution having issued for record	0	5	0

On Writs of Trial and Inquiry.

For a deputation	1	1	0
On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	0	4	0

On Trial or Inquisition.

Sheriff for presiding	1	1	0	
Bailiff for summoning jury, and attendance in court	0	4	0	
And if held at the office of the under-sheriff—				
For hire of room, if actually paid, not exceeding .	0	10	0	
For travelling expenses of under-sheriff from his office to place where trial or inquisition held				
	<i>per mile</i>	0	1	0
To the bailiff, from his residence	<i>per mile</i>	0	0	6
In all cases in which it shall appear to the master that a saving of expense has accrued to the parties by reason of a writ of trial having been executed by deputation, the fee for such deputation shall be allowed.				
On Writs of Extent, Elegit, Capias Utlagatum, and others of the like nature; for summoning the jury, use of room, presiding at the inquisition, &c.	2	2	0	
Jury	0	12	0	
For travelling expenses of under-sheriff from his office to the place of inquisition	<i>per mile</i>	0	1	0
For drawing and engrossing the inquisition <i>per folio</i>	0	1	6	
For a summons for the attendance of a witness	0	5	0	

[*As to the apportionment of the travelling expenses of the under-sheriff and bailiff, see post, 1279.*]

In Replevin.

[*Bond, see post, 1278.*]

Precept to bailiff	0	2	6
Notice for service on defendant	0	2	6
Broker, where the sum demanded and due shall exceed £20, and shall not exceed £50, for appraisement and affidavit of value	0	10	6
Where it shall exceed £50	1	1	0

	£	s.	d.
And his travelling expenses from his residence to the place where the goods are <i>per mile</i>	0	0	6
Bailiff for summoning parties and delivering goods to tenant	1	1	0
And his travelling expenses same as broker.			
For the warrant, record, and return of a re. fa. lo., accedas ad curiam, pone, or writ of false judgment	0	16	6
For writ retorno habendo	0	4	6
For each summons on a writ of sci. fa., or for the service of writ of capias where no arrest	0	5	0
And mileage <i>per mile</i>	0	1	0
For recording each demand or proclamation under writs of outlawry	0	2	0
For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex	0	2	6
In other counties	0	5	0
And travelling expenses, if the distance shall exceed five miles, then for every mile beyond that distance	0	0	6
For any supersedeas, writ of error, order liberati or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution	0	4	6
For the return of any writ or process, and filing same, exclusive of the fee paid on filing	0	1	0

Jury Process.

For return to common venire	0	3	6
The like to special	0	5	0
The like on distringas or habeas corpus for common jury	0	12	0
The like for special jury	0	14	0
The like with a view	1	0	0
The like to a traverse venire	0	14	6
For attendance naming special jury	2	2	0
Twenty-four warrants to summon special jury	1	4	0
For bailiff for summoning each special juror	0	2	0
Sheriff attending in court	1	1	0

For attending a view, the fees as allowed by rule of court, Trinity Term, 7 Geo. 4, 1826.

For any duty not herein provided for, such sum as one of the masters of the Courts of King's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas, may upon special application allow.

[Signed by all the Judges.]

SHERIFFS' FEES—ADDENDA.

Bond in Replevin.

£ s. d.

Instead of the allowance of the fees upon the same scale as the bail-bond, the fee of one pound one shilling only is allowed, whatever be the amount, if above £20

1 1 0

Fees on Writs of Trial and Inquisition.

The travelling expenses of the under-sheriff from his office, and of the bailiff from his residence, to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition be held at the same time and place.

[Signed by all the Judges.]

Where there are several defendants in a writ of capias, and warrants are issued thereon by the under-sheriff against more than one defendant, no more shall be charged in any case for each warrant, after the first, than two shillings and sixpence.

[Signed by eight of the Judges.]

A Table of Fees, prepared pursuant to the Statute 1 Vict. c. 30, s. 6, by Commissioners appointed under Stat. 11 Geo. 4, & 1 Will. 4, c. 58, and allowed and sanctioned by the Judges.

No fee whatever to be taken not comprised in this table; and whenever, by any change in the practice, any duty shall cease to be performed, the fee thereon also to cease.

1. *Writ Fee.*

For signing, sealing, and, where necessary, entering every writ, and for filing the same, and indorsing the day and hour when filed:—

	£.	s.	d.
Writ of capias	0	5	0
Alias writ of capias	0	2	6
Pluries	0	2	6
Writ of summons	0	5	0

	£	s.	d.
Alias or pluries	0	2	6
Writ of distringas	0	5	0
Alias or pluries	0	2	6
Writ of detainer	0	5	0
Scire facias	0	5	0
Habeas corpus ad testific.	0	5	0
Procedendo	0	5	0
Supersedeas (except when it is a prisoner's writ)	0	5	0
Prohibition	0	5	0
Consultation	0	5	0
Commission for witnesses	0	5	0
Certiorari	0	5	0
Seisin	0	5	0
Possession	0	5	0
Venditioni exponas	0	5	0
Pone	0	5	0
Distringas	0	5	0
Re. fa. lo.	0	5	0
Retorno habendo	0	5	0
Exigent	0	5	0
Allocatur exigent	0	5	0
Proclamations	0	5	0
Supersedeas to exigent	0	5	0
Capias utlagatum	0	5	0
Subpœna on capias utlagatum	0	5	0
Writ of false judgment	0	5	0
Mandamus	0	5	0
All other writs not specified, except execution writs and writs connected with the jury process	0	5	0
Inquiry of damages	0	5	0
Writ of trial	0	2	0
Attachment	0	1	0
Subpœna before the judge	0	2	0
Subpœna before the sheriff	0	1	0
Restitution	0	1	0
Venire facias juratores	}	Included in the Fee for signing Jury Process.	
Distringas			
Mittimus to a county palatine			
Habeas corpus ad satisfac.	{	When Prisoners' Writs, or sued out by Defendant.	
_____ cum causâ			

Nil.

For searching for all writs and præcipes—
each Term, see "Searches," No. 10, *post*,
1282.

For office copy of præcipe, see "office
copies, No. 14, *post*, 1283.

2. Appearance Fee.

For every appearance entered, whether in the ap- pearance book, or upon the roll, on cepi corpus	0	2	0
For every appearance for other defendants after the first	Nil.		

For every certificate of an appearance being
entered, see "Certificate," No. 11, *post*,
1282.

	£	s.	d.
3. Bail Fee.			
For filing every bail-piece	0	3	0
For every allowance and justification of bail	0	3	0
Every search for special bail-piece. See "Searches," No. 10, <i>post</i> , 1282.			
Every <i>post-terminum</i> on special bail-piece filed	Nil.		
Office copy of special bail-piece. See "Office Copies," No. 14, <i>post</i> , 1283.			
To a commissioner for taking special bail in the country <i>in each cause</i>	0	2	0

4. Rule Fee.			
Rule to plead	0	1	0
<i>Note.</i> —No fee to be taken on any rules to declare, reply, rejoin, or surrejoin, or any common rule relating to pleading, or on prisoners' rules.			
All other common rules	0	1	0
All other rules, when taken out, whatever be their length <i>one fee on each of</i>	0	4	0

5. Pleading Fee.			
For the pleadings, when issue is joined in fact or in law, or both <i>one fee of</i>	0	7	0
<i>Note.</i> —This fee is to be collected on signing the writ of trial, or on passing the record, or otherwise on the taxing of costs.			

6. Trial Fee.			
For signing the jury process and passing and sealing the record of <i>Nisi Prius</i>	0	7	0
For striking and reducing a special jury	1	1	0
For attending in any other court, with documents filed in the office <i>the officer's expenses.</i>			

7. Judgment Fee.			
For entering an interlocutory judgment, where no pleading fee of seven shillings has been previously payable	0	5	0
For entering a final judgment	0	7	0
For entering a judgment of nonpros	0	5	0
For a certificate of a judgment, see "Certificate," No. 11, <i>post</i> , 1282.			
For every satisfaction acknowledged upon record	0	5	0
For entering an <i>auditâ querelâ</i>	0	5	0
For entering a certiorari out of Chancery to certify a record	0	5	0
For indorsing the return on a writ of certiorari	0	3	0
For exemplifying a record	0	5	0

For searches for records in the upper or inner treasury, see "Searches," No. 10, *post*, 1282.

For copies of records, see "Copies," No. 14, *post*, 1283.

8. Execution Fee.

For signing (a) and sealing every writ of execution	0	1	0
For every commitment in execution and making marshal's or warden's lists	0	3	0

9. Error Fee.

For certifying a record upon a writ of error, each roll	0	10	0
For drawing and entering every rule in error	0	4	0
For entry of all proceedings in writs of error			Nil.

(Note.—All entries of proceedings in writs of error are to be prepared by the attornies).

For office copies of all proceedings when required, see "Office Copies," No. 14, *post*, 1283.

For examining the transcript with the roll, with the clerk of the House of Lords	1	1	0
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10. Search Fee.

Every search, other than for appearances and rules to plead in the same term			
	<i>per term</i>	0	0 3
	<i>except a single term</i>	0	0 6
Or a general search for judgments, where an index is kept		0	2 6

11. Certificate Fee.

For every certificate	0	1	0
For every certified copy of an entry in the books	0	1	0

12. Affidavit Fee.

For every affidavit sworn or affirmed in court, or before a commissioner, or in the master's office, exclusive of the usher's fee			
	<i>from each deponent</i>	0	1 0

13. Entry, Enrolment, Registration, and Filing, Fee.

For every entry of an attorney's annual certificate	0	1	0
For every enrolment or registration			
	<i>each deed or instrument</i>	0	3 0

(a) But see the R. H., 2 W. 4, r. 75, which makes it unnecessary to sign writs of execution. It would probably be held, however, that the fee must be paid for sealing

only. It is the practice to sign the writs since this table of costs, but it seems quite unnecessary. (See Vol. I. 420).

	£	s.	d.
For filing bail-piece taken before a commissioner in the country	0	1	1
For filing each affidavit, except affidavits to hold to bail and of service of process	0	1	0
For filing the affidavit and enrolling the articles previous to the admission of an attorney	0	5	0
Re-admission	0	2	6
For filing warrants of attorney or cognovits, when filed under the stat. 3 Geo. 4, c. 39.	0	1	0
For filing orders of Nisi Prius	0	1	0
For filing judge's order	0	1	0
And for any other instrument filed by order of the court or of a judge <i>each</i>	0	1	0

14. Copy, Transcript, or Extract Fee.

All office copies <i>per folio</i>	0	0	6
Every other copy, transcript, or extract <i>per folio</i>	0	0	6

15. Taxation Fee, References, and Interrogatories.

For taxing every bill of costs	0	1	0
If exceeding three folios <i>per folio</i>	0	0	4
For every report or determination of a master on special reference from the court	1	1	0
For every examination vivâ voce or on written interrogatories	1	1	0
For settling every bond as security for costs	0	10	6
For OUTLAWRY, see "Writs," "Searches," "Enrolments," "Copies."			

FEES OF UNDER USHERS AND CRIERS.

On the taking, adding, or justifying bail in court <i>each usher</i>	0	0	6
For every oath or affidavit sworn, or affirmation made in court, or before a judge at Westminster in term time <i>each</i>	0	0	1½
For every person appearing on recognisance <i>each</i>	0	0	6
For bail taken at bar (Q. B.) <i>each</i>	0	1	0
For an arraignment at bar (Q. B.) <i>each</i>	0	2	6
For every fine in court (Q. B.) <i>each</i>	0	0	6
For every discharge in court (Q. B.) <i>each</i>	0	0	6
For exhibiting articles of the peace <i>each</i>	0	0	6
For reversing an outlawry in civil cases <i>each</i>	0	1	0
For acknowledging a deed in court <i>each</i>	0	0	3
For a person charged in execution in court, or turned over on habeas corpus <i>each</i>	0	0	1½
For a trial at bar <i>each</i>	0	10	0
Calling and swearing jury on do. <i>each</i>	0	1	6
Swearing every witness on do. <i>each</i>	0	0	1½
Attending a jury on do. when they withdraw to consider their verdict <i>each</i>	0	1	0
Commission sworn in court <i>each</i>	0	1	0
Estreat delivered on oath in court <i>each</i>	0	1	0

	£	s.	d.
Recognisance taken in court (except of bail) <i>each</i>	0	2	0
On the signing of every final judgment <i>each</i>	0	0	3
For receiving and returning a record called in court, for the officer or officers producing the same <i>each record</i>	0	1	0
For attendance during argument of any case in the crown or special paper, or in the court of error <i>one fee for all the ushers</i>	0	4	0

COURT KEEPERS' FEES.

In the Exchequer and Common Pleas.

On the taking, adding, or justifying bail in court	0	0	4
Every guardian admitted in court	0	0	4
Every trial at bar	0	10	0

TIPSTAFFS' FEES.

Commitment upon habeas corpus at chambers <i>one fee of</i>	0	10	6
Renders in discharge of bail	0	10	6
——— in every action after the first	0	6	0
Commitments in execution by the court	0	10	6
Habeas corpus to Courts of Queen's Bench, Common Pleas, or Exchequer	0	10	6
Habeas corpus to take witnesses into court to give evidence, or for trial <i>per diem</i>	0	10	6
Habeas corpus to chambers to render in other actions	0	10	6
Bankrupts taken before the commissioners	0	10	6
Insolvent debtors to be heard upon their petition	0	3	0
Journies with bankrupts or insolvents, besides expenses of coach-hire or conveyance— <i>to principal per diem</i>	1	1	0
<i>and to assistant, if taken</i>	0	10	6
Prisoners taken into court by rule of court, under the Lords' Act	0	10	6
Trial at bar <i>each tipstaff, per diem</i>	0	10	6

JUDGES' CLERKS.

(WHETHER THE CLERKS OF CHIEF OR OF
PUISNE JUDGES.)

1. *Summons and Order Fees.*

Summons, each cause, in term	0	1	0
——— in vacation	0	2	0
Summons and order to try an issue before the sheriff	0	1	0
Order for writ of distringas	0	3	0
Order to hold to bail, upon affidavit before suing out a writ	0	3	0
Order for allowance of bail	0	3	0

	£	s.	d.
Order to enter up judgment on an old warrant of attorney	0	4	0
Order to enter satisfaction upon do.	0	3	0
Order to deliver documents off the file	0	4	0
Order to sue or defend in formâ pauperis	Nil.		
Order for admission to sue or defend by guardian	0	3	4
Order to charge a person, in custody for criminal matter, with an action	0	3	0
Order to change the venue	0	3	0
Order for amending record	0	3	0
Order for a special jury	0	3	0
Order of reference to arbitration, from each party applying for the order	0	4	0
Order to compel the attendance of witnesses before an arbitrator	0	3	0
Order to remand a prisoner	0	3	0
Order to remand or discharge a seaman	0	3	0
Order to docket judgment roll	0	3	0
Order to file a certificate of an acknowledgment of a deed	0	3	0
Order undertaking to pay debt or costs, or to pay attorney's bill, on taxation	0	3	0
Order to enter appearance	0	3	0
Order to render in discharge of bail	0	3	0
Order to exonerate bail	0	3	0
Order for judgment on writ of scire facias	0	3	0
Order to make a rule of court absolute	0	3	0
Order, other than above mentioned	0	2	0
Special commission to take acknowledgment of a married woman	0	5	0
Fiat for admission of attorney	0	10	6
Recognisance to appear and plead	0	10	6
Fiat for the enrolment of a deed	0	2	6
Fiat for commissions of sewers	0	10	6
Fiat for a certiorari on the crown side	0	2	0
Fiat for habeas corpus on the crown side	0	2	0
Fiat for habeas corpus ad testificandum	0	2	0
Bond from a merchant (being a member of Parliament) and his sureties, under the statute	0	10	6

2. Bail Fees.

Bails on cepi corpus in term or vacation (out of which 6 <i>d.</i> to the porter of Serjeants' Inn)	0	2	6
Do. on habeas corpus in a civil suit, in term or vacation (out of which 6 <i>d.</i> to the porter)	0	2	6
Justifying bail, in term or vacation	0	2	0
Delivering bail-pieces off the file, to attorney, for him to take to Westminster	0	1	0
Delivering bail-pieces off the file, which have been filed above a year	0	1	0
Bail on certiorari, in term or vacation (out of which, 6 <i>d.</i> to the porter)	0	2	6
Bail in error	0	2	0

	£	s.	d.
Surrender in discharge of bail, and commitment thereon (out of which 1s. to the porter)	0	7	6
Commitments to the custody of the marshal or warden (out of which 6d. to the porter)	0	3	6
Added bail	0	2	0
Approbation of commissioners for taking special bail	0	2	6
Approbation of commissioners for taking affidavits	0	2	6
Commission for taking special bail (including parchment, engrossing or printing and sealing) chief judge's clerk's fee	1	1	6
Commission for taking affidavits (including parchment, engrossing or printing and sealing) chief judge's clerk's fee	1	1	6

3. Attendance and Service Fees.

Attendance as commissioners to take affidavits	0	6	8
Attendance to take interrogatories <i>per diem</i>	1	1	0
Attendance at trial at bar <i>per diem</i>	1	1	0
Attendance at the judge's house, or elsewhere than at chambers, at the request of a party	0	6	8
Entry of caveat	0	2	6
Special case for the opinion of the court	0	2	6
Special case from Chancery	0	5	0
Special verdict	0	2	6
Demurrer and other paper books	0	2	6
Exhibit to which judge's signature is required	0	1	0
Deed acknowledged	0	1	0
Deed acknowledged by married women	0	7	6
Second acknowledgment by do.	0	3	6
Certificate on Nisi Prius record	0	2	6
Certificate of bail not being put in	0	2	6
Copying judge's notes	0	10	6
Producing judge's notes	0	2	6
Escape warrant	0	5	0
Warrant to apprehend a bankrupt	0	10	6
Attendance by counsel <i>on each side</i>	0	5	0
Signing a bill of exceptions	0	5	0
Signing depositions	0	2	0
Certificate on special case to courts of equity	0	10	6

4. Office Copies.

Office copies of interrogatories	<i>per folio</i>	0	0	6
Do. of depositions	<i>per folio</i>	0	0	6
Do. of affidavits, if required	<i>per folio</i>	0	0	6

5. Affidavits.

For taking affidavits or affirmations, from each deponent, including all exhibits annexed,				
in term	0	1	0	
in vacation	0	2	0	
For keeping affidavits and carrying them to the rule office to be filed	<i>each</i>	0	1	0

	£	s.	d.
Fiat for allowance of a writ of error to the Exchequer Chamber	0	6	2
Do.	0	12	4

[Signed by all the Judges.]

HILARY VACATION, 4 WILL. IV.

Directions to Taxing Officers, as to all Writs issued on or after the 15th March, 1834 (a).

IN all actions of assumpsit, debt, or covenant, where the sum recovered or paid intocourt, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds, (without costs), the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed.

Provided, that, in case of trial before a Judge in one of the superior Courts, or Judge of Assize, if the Judge shall certify on the postea that the cause was proper to be tried before him, and not before a Sheriff or Judge of an inferior Court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of twenty pounds, or not, in the following form :—

Debt above twenty pounds.

Debt twenty pounds, or under.

The officers of the Court of Exchequer to allow no incipiturs of judgment on paper, and are to mark the costs on the postea.

Three shillings and fourpence to be allowed for drawing the judgment in all cases.

Every brief sheet to contain eight folios at the least, which are to be paid for at the rate of six shillings and eightpence per sheet for drawing, and three shillings and fourpence for copying.

For every witness, the allowance for travelling to be the expense actually paid, not exceeding one shilling per mile, unless under special circumstances.

No fee to counsel to be allowed on writs of trial, except on trials before the Judge of the Sheriff's Court of London, or of other Courts of Record where attornies are not allowed to practise, and then one guinea only.

The fees to be allowed to counsel's clerks not to exceed as under :—

	£	s.	d.
Upon a fee under ten guineas	0	2	6
Ten guineas, and under twenty guineas	0	5	0
Twenty guineas and upwards	0	10	0
Senior counsel's clerk on consultation	0	7	6
The other counsel's clerk, each	0	2	6
Attending as a witness at trials to prove documents	0	10	6

(a) For the decisions on this rule, see Vol. II. p. 1167.

SCHEDULE I.
Commencement of Suit.

	£	s.	d.
Letter before action, if sent	0	2	0
Instructions to sue	0	3	4
Writ	0	10	0
Copy and service	0	5	0
Bill and copy to indorse	0	2	0
Searching for appearance	0	3	4
Instructions for declaration	0	3	4
Drawing same at 1s. per folio.			
Engrossing at 4d.			
Notice thereof, when filed	0	5	0
Drawing particulars and copy	0	2	6
Rule to plead	0	1	0
Demanding plea	0	3	0
Drawing issue, of whatever length	0	3	4
Engrossing issue to deliver, at 4d. per folio			
Notice of trial	0	2	0

SCHEDULE II.

When the Cause is tried before the Sheriff.

Summons for trial	0	1	0
Copy of service	0	3	0
Attending for order	0	3	4
Paid for order	0	1	0
Copy and service	0	3	0
Engrossing writ of trial, (folio 14)	0	4	8
Parchment	0	3	0
Paid sealing	0	0	7
Attending thereon	0	3	4
Copy particulars to annex	0	2	0
Subpoena	0	5	0
Copy and service	0	3	0
Making minutes of evidence for the hearing	0	13	4
Attending to enter the cause	0	3	4
Paid in part of the sheriff's fee on leaving the same (No more to be paid if withdrawn before trial).	0	4	0
Attending Court on trial	0	13	4
Paid rest of fees for trial	1	4	6
Notice of taxing	0	3	0
Affidavit of increase	0	5	0
Paid filing affidavit (whether town or country)	0	1	0
Bill of costs and copies	0	4	0
Attending taxing	0	3	4
Paid taxing (in Q. B. and Exch.)	0	2	6
Drawing judgment	0	3	4
Entering on the roll at 4d. per folio.			
Paid roll	0	0	10
Paid entries (as before).			
Paid judgment fee and docket (as before).			

	£	s.	d.
Attending thereon	0	3	4
Term fee	0	10	0
Letters in County Causes:—			
Under 50 miles, 2s.			
Above 50 miles, 4s.			
Above 100 miles, 6s.			
Where fi. fa., and warrant thereon, viz.:—			
In town	0	8	0
In country	0	13	0

SCHEDULE III.

When the Cause is tried at Nisi Prius, and Verdict for 20l. or under.

Engrossing record (folio 14)	0	4	8
Parchment	0	3	0
Paid sealing	0	0	7
Attending thereon	0	3	4
Copy particulars to annex	0	2	0
Venire	0	6	6
Paid return	0	2	0
Attending thereon	0	3	4
Distringas	0	7	6
Paid return (about)	0	15	0
Attending thereon	0	3	4
Subpœna	0	5	0
Copy and service	0	3	0
Instructions for brief	0	13	4
Brief and copy (and no more)	2	0	0
Attending to enter cause	0	3	4
Paid entering (about)	0	18	0
— counsel (as usual).			
Attending Court on trial	1	1	0
Paid fees on trial (about)	3	15	0
Postea	0	5	0
Notice of taxing	0	3	0
Affidavit of increase	0	5	0
Paid filing same	0	1	0
Bill of costs and copies	0	4	0
Attending taxing	0	3	4
Paid taxing (in Q. B. and Exch.) as usual, say	0	4	0
Drawing judgment	0	3	4
Entering on the roll, at 4d., about 19 fol.			
Paid roll	0	0	10
Paid judgment fee and docket.			
Attending thereon	0	3	4
Term fee	0	10	0
Letters in country (as to distance).			
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